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IN THE

Supreme Court of the United States

OCTOBER TERM 1996

MITSUE TAKAHASHI,
Petitioner,

v.

LIVINGSTON UNION SCHOOL DISTRICT,
et al.,

Respondents.

On Petition for a Writ of Certiorari to the Court of Appeal of the State of California, Fifth Appellate District

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PETITION FOR A WRIT OF CERTIORARI

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16pp

QUESTIONS PRESENTED

1. Does public school official's intentional misrepresentations regarding availability of classroom teaching positions made to Japanese female, over the age of forty, coupled with superintendent's statements to Department of Fair Employment and Housing investigator describing Japanese educators as "too quiet" and "not assertive," constitute substantial evidence of a prima facie case of age, national origin, and/or gender discrimination as defined by McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817 (1973), the Civil Rights Act of 1871, 42 USC § *et seq.*, and Title VII, 42 USC §2000e, *et seq.*, in terms of summary judgment?

2. Does public school official's intentional misrepresentations regarding availability of classroom teaching positions made to Japanese female, over the age of forty, coupled with superintendent's statements to Department of Fair Employment and Housing investigator describing Japanese educators as "too quiet" and "not assertive" constitute substantial evidence of pretext and intentional discrimination as defined by McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817 (1973), the Civil Rights Act of 1871, 42 USC § *et seq.*, and Title VII, 42 USC §2000e, *et seq.*, in terms of summary judgment?

PARTIES TO THE PROCEEDING

The petitioner is Mitsue Takahashi, a credentialed California educator formerly employed by respondent, Livingston Union School District ("LUSD"), a California Public School District. Respondent Henry Escobar was at all relevant times the Assistant Superintendent of LUSD. Tenured teachers, as well as non teachers holding professional licenses, all have a vital interest in the outcome of this case. Additionally, students of this nation's public schools have a vital interest in the outcome of this case.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED.....i

PARTIES TO THE PROCEEDING.....ii

TABLE OF CONTENTS.....iii

TABLE OF AUTHORITIES.....iv

OPINIONS BELOW.....2

JURISDICTION.....2

STATUTORY PROVISIONS AND FEDERAL RULES OF CIVIL PROCEDURE INVOLVED.....2

STATEMENT OF THE CASE.....6

REASONS FOR GRANTING THE PETITION.....11

CONCLUSION.....23

APPENDIX.....1a

APPENDIX A: August 14, 1996, Order of the Supreme Court of the State of California Denying Takahashi's Petition For Review.....1a

APPENDIX B: May 13, 1996 Opinion of California Court of Appeal, Fifth Appellate District.....2a

Page

APPENDIX C: September 7, 1994, Judgment Under Code of Civil Procedure Section 437C, Entered by the Superior Court of California, County of Merced.....41a

APPENDIX D: August 26, 1994, Order For Entry Of Summary Judgment by the Superior Court of California, County of Merced.....42a

TABLE OF AUTHORITIES

Federal Cases:

McDonnell Douglas Corp. v. Green, (1973) 411 U.S. 792, 36 L.Ed.2d 668, 93 S.Ct. 1817.....10,14

Brand v. Tele-Communications of S. Suburbia, Inc. (N.D.Ill. 1989) 50 FEP 1767.....12

Mamos v. School Comm. (D.Mass. 1983) 535 F. Supp. 989, 30 FEP 1951.....12

Lam v. University of Hawaii (Hawaii 1994) 40 FEP F.3d 551.....13

Sischo-Nownejad v. Merced Community College Dist. (9th Cir. 1991) 934 F.2d 1104.....14

Texas Dept. of Community Affairs v. Burdine, (1981) 450 U.S. 248, 67 L.Ed.2d 207, 101 S.Ct. 1089.....14

Page

Miles v. M.N.C. Corp. (11th Cir. 1985)
750 F.2d 867.....14

Mira v. Monroe County School Board
(S.D.Fla. 1988) 687 F.Supp. 1538.....15

United States v. Diebold (1962)
369 U.S. 654, 82 S.Ct. 993,
8 L.Ed.2d 176.....15

Poller v. Columbia Broadcasting System
(1962) 368 U.S. 464, 82 S.Ct. 486,
7 L.Ed.2d 458.....15,16

White Motor Co. v. United States (1963)
372 U.S. 253, 83 S.Ct. 696,
9 L.Ed.2d 738.....16

Wilson v. McDaniel (M.D.N.C. 1991)
54 Fair Empl. Prac. Cas. (BNA) 1499
[57 Empl. Prac. Dec., (CCH) para
11,222].....16

Kelly v. Municipal Court of Marian County
(S.D.Ind. 1994) 852 F.Supp. 724.....19

Bray by Bray v. Hobart City School Corp.
(N.D.Ind. 1993) 818 F.Supp. 1226.....19

Aronsen v. Crown Zellerbach (C.A.Cal. 1981)
662 F.2d 584, *cert denied*
103 S.Ct. 1183, 459 U.S. 1200,
75 L.Ed.2d 431.....19

Manok v. Southeast Dist. Bowling Ass'n
(D.C.Cal. 1969) 306 F.Supp. 1215.....20

Page

Dawn v. Sterling Drug, Inc.
(D.C.Cal. 1970) 319 F.Supp. 358.....20

Giordano v. Lee (C.A.Mo. 1970)
434 F.2d 1227, cert denied
91 S.Ct. 2250, 403 U.S. 931,
29 L.Ed.2d 709.....20

Board of Education, Island Trees Union
Free School District No. 26 v. Pico
(1982) 457 U.S. 853, 102 S.Ct. 2799,
73 L.Ed.2d 435.....21

State Court Decisions:

Kennett-Murray Corp. v. Bone
(C.A.Ala. 1980) 622 F.2d 88.....20

Rojo v. Kliger (1990) 52 C.3d 65,
276 Cal.Rptr. 130.....21

Carmichael v. Alfano Temporary Personnel
(1991) 233 Cal App.3d 1126,
285 Cal.Rptr. 143.....21

Blom v. N.G.K. Spark Plugs (U.S.A.), Inc.
3 Cal.App.4th 382, 4 Cal.Rptr.2d 139....21

Federal Statutes and Regulations:

28 U.S.C. § 1257(a).....2
42 USC §1983.....2,3
42 USC §2000e-2.....2,3,4
Federal Rules of Civil Procedure,
Rule 56.....2,3,4,5,13

Page

State Statutes and Regulations:

California State Education Code § 44660, *et seq.*.....16
California State Education Code § 44938(b)(1).....16

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Mitsue Takahashi ("Takahashi"), respectfully petitions for a writ of certiorari to review the decision of the Court of Appeal of the State of California in and for the Fifth Appellate District, entered May 13, 1996.

OPINIONS BELOW

Takahashi's Petition For Review was denied by the Supreme Court of California on August 14, 1996. *See*, Appendix (App.) A at 1a. The unreported opinion of the California Court of Appeals, Fifth Appellate District, was entered on May 13, 1996. *See*, App. B at 2a. Summary Judgment was entered against Takahashi by the Superior Court of California, County of Merced, on September 7, 1994. *See*, App. C at 41a. The Superior Court's Summary Judgment Order, which is at issue, is dated August 26, 1994. *See*, App. D at 42a.

JURISDICTION

The order denying Takahashi's Petition For Review was entered by the Supreme Court of California on August 14, 1996. The jurisdiction of this court is invoked under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS AND FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

This case involves a determination of discrimination as defined by the Civil Rights Act of 1871, 42 U.S.C. § 1983, *et seq.*, and Title VII, 42 U.S.C. §2000e, *et seq.* in the context of summary judgment, Federal Rules of Civil Procedure, Rule 56.

The Civil Rights Act of 1871, 42 U.S.C. § 1983, *et seq.*, provides the statutory basis of Takahashi's complaint. Specifically, 42 U.S.C. § 1983 provides:

> Every person who, under color of any

> statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to th deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Title VII, 42 U.S.C. § 2000e-2 defines the "Unlawful employment practices" alleged by Takahashi in the following manner:

> (a) Employer practices
>
> It shall be an unlawful employment practice for an employer---
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because

> of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(m) goes on to provide:

> Impermissible consideration of race, color, religion, sex, or national origin in employment practices
>
> Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

Whether LUSD and Escobar discriminated against Takahashi in this case is a question that must be determined within the parameters of summary judgment, Federal Rule of Civil Procedure 56 ("Rule 56"). Rule 56(a) provides in pertinent part:

> For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

Rule 56(c) provides in pertinent part:

> Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of the

hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Finally, Rule 56(e) provides in pertinent part:

> Form of Affidavits; Further Testimony; Defense Required. Supporting or opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

STATEMENT OF THE CASE

Takahashi is a female, over the age of forty, and an American of Japanese descent. She is a credentialed California educator, with a 21 year (1960-1980) record of successful teaching for respondent Livingston Union School District ("LUSD"). On April 26, 1991, Takahashi attended the Merced County Teachers' Job Faire in which LUSD participated. At the Job Faire, Takahashi asked LUSD Assistant Superintendent Henry Escobar ("Escobar") whether LUSD had classroom teaching positions available. Escobar stated that there were none. However, soon after Takahashi's inquiry, she overheard Escobar tell two young Caucasian males that there were indeed two classroom teaching positions available. Surprised, Takahashi asked Escobar's assistant, Carol Campbell, about the availability of classroom teaching positions. Ms. Campbell responded that there were, specifically, two general seventh and eighth grade mathematics and science openings.

Takahashi successfully made application for the two junior high school classroom teaching positions in 1991. However, Takahashi's application was not considered by LUSD and/or Escobar because LUSD had discharged her for alleged incompetence in 1980.

Takahashi was indeed dismissed for incompetence by a three member Commission on Professional Competence in 1980 by a vote of 2 to 1. The Commission consisted of three members, including Karyl (Cindi) Rubin, a teacher, an administrator, and the hearing officer. Ms. Rubin found that Takahashi was indeed *competent to teach*. However, it was the one vote of the hearing officer, who had no

qualification to assess teacher competency, that destroyed the career and life of a teacher.

The Committee's findings include:

"IV The contents of Findings XI, XII and XV were considered in the formulation of the Order...

"XI Respondent has been a classroom teacher in the District for about twenty-one years. She has an excellent education, is well-spoken, attractive and pleasant. She is well liked by many of her students but even those who like her and consider her an effective teacher agree that there was a good deal of disorder in respondent's classroom. There was no evidence of serious problems before 1978, and until a new principal took over during the 1978/1979 school year.

"XII Respondent and her students accomplished the academic goals set at the beginning of the 1978/1979 and the 1979/1980 school years...

"XV Since the beginning of the 1980/1981 school year, respondent has been employed by the District as a substitute and as a resource teacher. She has been successful in both of these assignments...

"ORDER

"1. Respondent Mitsue Takahashi shall be dismissed from her position as a permanent certificated employee of the Livingston Union School District.

"2. This Decision shall become effective forthwith."

On or about February 19, 1985, a Committee of Credentials of the State Commission On Teaching Credentialing issued a determination that no probable cause existed for the charge of incompetence and continued to uphold Takahashi's life teaching credentials despite the dismissal for incompetence.

At the time of application, Takahashi possessed, among others, the following qualifications for the two available classroom teaching positions:

1. Takahashi had permanent verification of competency by passing the state teacher competency examination (California Basic Education Skills Test--CBEST);

2. Takahashi possessed life teaching credentials to teach in all grades of any public secondary school, in the seventh and eighth grade, and in any public elementary school, received from the California State Board of Education;

3. Indeed, Takahashi's transcripts demonstrated her qualifications for the two classroom positions;

4. Takahashi had taken extensive courses in computer science at California State University Stanislaus, many focusing on instruction in elementary and secondary schools;

5. Takahashi had approximately twenty-one (21) years of teaching experience as a junior high school mathematics teacher at LUSD;

6. Takahashi possessed a Masters Degree in mathematics education;

7. Takahashi possessed a Bachelor of Arts Degree in science from Stanford University;

8. Takahashi had taken Spanish Language courses at Merced College since her dismissal from LUSD; and several intensive Spanish courses at California State University Stanislaus during her career;

9. Takahashi had also taught in Spanish throughout her teaching career on a limited basis; and

10. Takahashi's record of participation in multi-ethnic and migrant education programs is extensive as was set out in detail in her 1991 application.

Oscar Pena ("Pena"), the applicant selected for the advertised science position, was under the age of forty, a male, and not of Japanese descent. It is clear from the record that Takahashi was far more qualified for the science position than Pena, as evidenced by the following:

1. Pena held no teaching credentials. Indeed, according to his application, he had only applied for an "Intern Credential." Takahashi held life teacher's credentials at the elementary and secondary levels.

2. Pena submitted an incomplete job application at least ten days late and was hired on May 22, 1991. Takahashi's complete application was timely filed on April 26, 1991, and according to Escobar, immediately eliminated without any consideration, and a rejection letter was sent on June 5, 1991.

3. Pena's major was in liberal arts. Takahashi's undergraduate major was science. and

4. Pena did not hold a four-year college degree and had no teaching experience at the time he made his application. Whereas, Takahashi held a four-year degree and a master's degree, and a 21 year record of teaching success at LUSD.

On July 22, 1994, Takahashi's attorneys conducted the deposition of LUSD Superintendent Harold Thompson ("Thompson"). At said deposition, Thompson admitted that he had previously met with a Senior Consultant with the Fresno Office of the Department of Fair Employment and Housing ("DFEH"), Antonio Aguilar ("Aguilar"), for the purpose of discussing discriminatory practices by LUSD alleged in a prior DFEH complaint filed by Takahashi. Aguilar stated that, after said meeting, Thompson stated to him that persons of Japanese descent tend to be "quiet" and "not assertive."

Aguilar verified that the conversation took place in a Declaration made based on his personal knowledge. Further, Aguilar stated in said Declaration that Thompson told him that *Takahashi* "would have problems overcoming her alleged teaching difficulties (including classroom control) because *the Japanese* tend to be too 'quiet' and 'not assertive.'"

Thompson and Escobar were responsible for staff recruitment at LUSD in 1991 when Takahashi made her application for the two junior high school teaching positions.

This Petition concerns the Superior Court of Merced County's determination, on motion for

summary judgment, that Takahashi failed to establish a prima facie case of race, national origin, gender, and/or age discrimination as defined by this court in McDonnell Douglas Corp. v. Green (1973) 411 U.S. 792, 36 L.Ed.2d 668, 93 S.Ct. 1817. Furthermore, the Superior Court found that Takahashi had also failed to demonstrate that LUSD's and Escobar's proffered reasons for their discriminatory actions were pretextual.

Specifically, LUSD and Escobar argue that their decision not to consider Takahashi's employment application was legitimate, since Takahashi had been previously dismissed by LUSD in 1980 for alleged incompetence. Furthermore, LUSD desired bilingual applicants for the science and mathematics positions (though taught to English speaking 7th and 8th grade students).

However, Takahashi never received a trial on the issue of her competence in 1980 and the sole requirement for the 1991 teaching positions was a "valid credential authorizing services in designated grades and subject areas." Pena did not meet that requirement, Takahashi did.

The California Court of Appeal, Fifth Appellate District, affirmed the trial court's decision. The Supreme Court of California denied the opportunity to review the case.

REASONS FOR GRANTING THE PETITION

I. *The Questions Presented Are Of National Importance.*

A. Direct Evidence of Discrimination Practiced Against American Of Japanese Descent By Public School Officials Defeats Summary Judgment And The Inconsequential Effect Of Hiring An Unlicensed Person.

Takahashi established direct evidence of discrimination, yet she has been denied a trial before her peers. The disparaging charge and remarks made by Thompson in 1982, coupled with a hostile work environment during 1978-1980, and the treatment of her at the Job Faire and her application in 1991, evidence prohibited discrimination by public school officials that will go unpunished unless this court chooses to act. In the face of such evidence, the pretextual "legitimate" excuses given by LUSD and Escobar for eliminating Takahashi's employment application cannot stand the test of scrutiny.

The court must first recognize that the California Court of Appeals dismissed the discriminatory remarks made in 1982 by Thompson, finding them unrelated to the instant case, but relied instead on the untested 1980 charge of incompetence that was discounted by the State Commission on Teacher Credentialing in 1985.

Indeed, under the "continuing wrong" theory of discrimination, if Takahashi can establish a timely discriminatory act, earlier discriminatory acts can be used to show LUSD's and Escobar's discriminatory intent. Brand v. Tele-Communications of S. Suburbia, Inc. (N.D. Ill. 1989) 50 FEP 1767. (See also Mamos v. School Comm. (D.Mass. 1983) 535 F.Supp. 989, 30 FEP 1051.

The point is, Thompson's statements in 1982 evidence a discriminatory stereotype to which he disparagingly subscribed regarding Americans of Japanese descent generally, and of Takahashi, an American of Japanese descent, particularly. In fact, the statements were made during a discussion that Thompson had with Aguilar *regarding the previous employment decision made with respect to Takahashi.* Thompson's stereotype certainly was part of his thought processes in 1991, when he and Escobar refused to consider Takahashi's application.

Thompson's stereotypical bias, Escobar's misrepresentations to Takahashi (a female, over the age of forty, and an American of Japanese descent) regarding the availability of teaching positions at the Job Faire, and LUSD's hiring of an unlicensed person on May 22, 1991, are all direct evidence of the true discriminatory motives behind LUSD's and Escobar's refusal to consider Takahashi's application, raising a triable issue of material fact with regard to the existence of pretext.

A strikingly similar case was heard by a Hawaiian court in Lam v. University of Hawaii (Hawaii 1994) 40 F.3d 1551, *as amended.* In that case, the court denied summary judgment based on Rule 56, finding that a public university official refused to hire a female of Vietnamese descent due to said officials' biased attitude towards women and Asians. Additionally, said official had disparaged the abilities of the applicant in that case, as Thompson disparaged Takahashi in this case.

When public school officials are allowed to make employment decisions based upon demeaning stereotypes, the education of this nation's children is jeopardized. This court

cannot sanction such behavior and must provide Takahashi an opportunity to be heard such that discrimination can be reduced in the nation's public school system and for the protection of the integrity of state teaching licenses.

II. *The California Courts Decided An Important Federal Question In A Way That Conflicts With Relevant Decisions Of This Court And Other Federal Courts*

A. California Courts Imposed Unreasonable Evidentiary Burden Upon Takahashi.

The California Court of Appeals recognized that the burden of establishing a prima facie case under McDonnell Douglas Corp. v. Green, (1973) 411 U.S. 792, 36 L.Ed. 2d 668, 93 S.Ct. 1817, is slight, stating that "the amount of evidence that must be produced in order to create a prima facie case is 'very little.'" (*citing* Sischo-Nownejad v. Merced Community College Dist. (9th Cir. 1991) 934 F.2d 1104, 1110-1111.) See also Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253, 67 L.Ed.2d 207, 101 S.Ct. 1089 (1981); Miles v. M.N.C. Corp. (11th Cir. 1985) 750 F.2d 867, 870. Yet, it is clear that Takahashi was unjustifiably and discriminatorily held to a higher evidentiary standard.

Of the four-prong prima facie case set forth in McDonnell Douglas, the lower courts specifically found that Takahashi had failed to provide sufficient evidence that she was qualified for the advertised teaching positions. To the contrary, Takahashi provided a wealth of evidence that she was qualified for the teaching positions. She certainly provided more evidence than the "very little" required. In fact,

Takahashi possessed far superior qualifications to those of the applicant selected for the science position, Oscar Pena. In terms of summary judgment, it should be clear to this court that Takahashi satisfied her evidentiary burden and the lower courts' findings on this issue should be reversed.

B. Takahashi Was Qualified To Teach At The Time She Made Application, Possessing Properly Authorized Life Teacher's Credentials And Permanent Verification Of Competency.

LUSD and Escobar vigorously argue that Takahashi was not qualified to teach, as a matter of law, because she had been dismissed by LUSD for alleged incompetence on November 6, 1980. The appellate court properly noted that there is no California case authority directly on point.

LUSD and Escobar cite two cases in support of their position that Takahashi was not qualified, as a matter of law. However, neither case stands for the proposition that a previous firing renders one unqualified to teach. Also, each case is clearly distinguishable from the instant case.

First, Mira v. Monroe County School Board (S.D.Fla. 1988) 687 F.Supp. 1538, is distinguishable on procedural grounds. Mira involved a bench trial not subject to the special rules and procedures that apply to summary judgment proceedings. Favoring a trial on the merits, this court has mandated a cautious attitude toward summary judgment motions, and any doubt as to whether to grant the motion is to be resolved in favor of the party opposing it. United States v. Diebold

(1962) 369 U.S. 654, 655, 82 S.Ct. 993, 8 L.Ed.2d 176.

On several occasions, this court has stated its preference for trial over summary judgment, favoring the full exploration given a case at trial. Poller v. Columbia Broadcasting System (1962) 368 U.S. 464, 82 S.Ct. 486, 7 L.Ed.2d 458; White Motor Co. v. United States (1963) 372 U.S. 253, 83 S.Ct. 696, 9 L.Ed.2d 738. The California courts improperly deprived Takahashi of her day in court. She asks that this court provide her the opportunity to cross-examine LUSD and Escobar in the presence of a jury to expose their discriminatory and retaliatory acts.

Second, Wilson v. McDaniel (M.D.N.C. 1991) 54 Fair Empl. Prac. Cas. (BNA) 1499 [57 Empl. Prac. Dec., (CCH) para 11,222], featured a plaintiff who presented no evidence of qualifications for the subject position. Id. at 1501. Additionally, the plaintiff offered no evidence that the defendant's reasons for action were pretextual. Id. at 1501. In the instant appeal, Takahashi has offered evidence of qualification, discrimination, and pretext.

Whether one is competent to perform an act is a factual question that can only be answered at the moment it is asked. LUSD completely ignored the possibility that Takahashi may have cured alleged deficiencies and that she had been subjected to harassment and intimidation, and the "serious problems" instigated by new principals appointed by Thompson, as stated in the 1980 Decision, Section XI, previously cited.

Discriminatory evaluation processes must not be used. California Education Code sections 44660, *et seq.* and 44938(b)(1), require a school

district to establish a uniform system of assessing its certificated persons (Stull Act).

In the instant case, since her dismissal for alleged incompetence, Takahashi took the state teacher competency examination in 1989 (California Basic Education Skills Test--CBEST) for which she received permanent verification of competency. She had also taken extensive courses in computer science at California State University Stanislaus, and under a program sponsored by the Merced County Department of Education, focusing on instruction in elementary and secondary schools. Finally, Takahashi had also taken Spanish Language and management courses at Merced College.

The court should also note that in 1985, a Committee of Credentials of the State Commission On Teaching Credentialing issued a determination that no probable cause existed for the suspension or revocation of Takahashi's life teaching credentials despite the dismissal for alleged incompetence by LUSD. Thompson nor Escobar never cited any specific incident of teacher incompetence nor remedial effort by LUSD.

This court should find that Takahashi was qualified for the positions, as a matter of law, as Takahashi met LUSD's only requirement, "valid credential authorizing services in designated grades and subject areas." Hence, there is a genuine issue as to the fact of qualification in this case.

All can agree that, whether one is qualified for a position is inherently a factual question for the trier of fact. Justice dictates that Takahashi have the opportunity to be heard on that issue and be judged by the same

standards as other teachers employed by LUSD similarly situated.

C. Bilingual Ability Was Not A Requirement Of Application For The Advertized Jobs.

LUSD and Escobar pretextually contend that the applicant hired for the science position, Pena, was hired because he was allegedly bilingual, filling a need of LUSD. They contend that hiring Pena on that ground provides a legitimate, nondiscriminatory reason for rejecting Takahashi. There was no evidence that Pena held state bilingual certification. There was no evidence that Pena and Takahashi were tested or interviewed. However, their excuse is pretextual, as there was no requirement that applicants be bilingual. The "Certificated Announcements" announcing the availability of the subject math and science positions simply read: "Spanish speaking ability desirable." Therefore, bilingual ability was not a *requirement* of employment.

Takahashi absolutely by record surpassed Pena in the other "desirable" qualification of "knowledge of current instructional strategies and 'models of teaching.'"

Also, although not bilingual, Takahashi had sufficient knowledge of the Spanish language to effectively teach at the Livingston Union School District *for over twenty years.* She had taken Spanish language courses at Merced College since her dismissal in 1980 and her graduate work at California State University was specifically directed to LUSD's students and University transcripts show excellent reports in related courses:

1. Teaching Migrant Children, 10 units in 1970;
2. Workshop in District Program Development, 4 units in 1971;
3. Intensive Spanish, 3 units in 1976;
4. Elements of Instruction, 3 units in 1978; and
5. 3 courses in current instructional methods, 1 unit each in 1979.

Takahashi had taught in Spanish throughout her teaching career on a limited basis.

Additionally, Takahashi's record of participation in multi-ethnic and federal migrant education programs was extensive, as set out in detail on her 1991 application.

Takahashi's extensive training and experience educating Spanish-speaking students cannot be denied. Importantly, her qualifications in this regard had been tested and proved in the classroom. LUSD and Escobar are simply using "bilingual ability" to conceal their discriminatory motives and the illicit hiring of an unlicensed applicant on May 22, 1991.

1. Summary Judgment Is Not Favored When Motive Or Intent Is An Issue.

Many federal courts have found summary judgment to be improper in cases where motive or intent is a critical issue. Kelly v. Municipal Court of Marion County (S.D.Ind. 1994) 852 F.Supp. 724; Bray by Bray v. Hobart City School Corp. (N.D.Ind. 1993) 818 F.Supp. 1226. The discriminatory intents and motives of LUSD and Escobar are certainly material issues in this case that were not properly determined pursuant to the rules of summary judgment. This court

should reverse the lower courts' summary judgment finding on this ground.

D. California Courts' Improperly Weighed Evidence In Ruling On Summary Judgment.

The lower courts improperly weighed the evidence in this case, and consequently, Takahashi was denied her day in court. It is well settled that courts cannot weigh evidence when determining whether to grant or deny summary judgment. The point was made clear in Aronsen v. Crown Zellerbach (C.A.Cal. 1981) 662 F.2d 584, *cert denied* 103 S.Ct. 1183, 459 U.S. 1200, 75 L.Ed.2d 431. In that case, the court provided that neither an appellate court nor a trial court is permitted to weigh the evidence, pass upon credibility, or speculate as to the ultimate findings of fact on motion for summary judgment.

In the instant case, Takahashi provided sufficient evidence that she was discriminated against by LUSD and Escobar. The actions both of Thompson and Escobar were clearly discriminatory, and justify a denial of summary judgment. Whether the courts below believe Takahashi's evidence has probative value is for a jury to assess. Kennett-Murray Corp. v. Bone (C.A.Ala. 1980) 622 F.2d 887.

E. Takahashi Was Wrongly Denied Her Day In Court.

Takahashi deserves her day in court, and the federal courts favor a trial on the merits. Indeed, it has been stated by the federal courts time and again that the summary judgment procedure should be used sparingly so that no plaintiff having a scintilla of merit to [her]

cause should be denied [her] day in court. Manok v. Southeast Dist. Bowling Ass'n (D.C.Cal. 1969) 306 F.Supp. 1215; Dawn v. Sterling Drug, Inc. (D.C.Cal. 1970) 319 F.Supp. 358. Furthermore, it is as clear that the courts view summary judgment as an extreme remedy which should be sparingly employed. Giordano v. Lee (C.A.Mo. 1970) 434 F.2d. 1227, *cert. denied* 91 S.Ct. 2250, 403 U.S. 931, 29 L.Ed.2d 709.

Takahashi's case has much more than a scintilla of merit and summary judgment was improper. This court must recognize the injustice suffered by Takahashi and remedy it by reversing the decisions below.

III. *Public Policy Dictates That Takahashi Receive A Trial On The Merits, To Insure The Integrity Of A State-Issued License, Job Tenure Rights, The Education Of The Nation's Children & Equal Employment Opportunity.*

This court does not favor summary judgment in cases involving constitutional or other public issues. Board of Education, Island Trees Union Free School District No. 26 v. Pico (1982) 457 U.S. 853, 102 S.Ct. 2799, 73 L.Ed.2d 435. All can agree that eradication of illicit discrimination in this nation's schools as well as the workplace is of paramount importance. State-issued licenses must also be protected from discriminatory treatment.

For example, 42 USC § 2000e-2 is an unambiguous prohibition against discrimination in the workplace, protecting applicants from sex, race, creed, color, or national or ethnic origin discrimination and retaliation.

Furthermore, when the public good is at stake, California and other state court decisions recognize a public policy against discrimination in all sorts of cases, including cases of sex discrimination (Rojo v. Kliger [1990] 52 C.3d 65, 90, 276 Cal.Rptr. 130); race discrimination (Carmichael v. Alfano Temporary Personnel [1991] 233 Cal.App.3d 1126, 1132, 285 Cal.Rptr. 143); and national origin discrimination (Blom v. N.G.K. Spark Plugs (U.S.A.), Inc. [1992] 3 Cal.App.4th 382, 386-388, 4 Cal.Rptr.2d 139).

Takahashi has exposed, at the very least, the stereotypical beliefs of Thompson towards Americans of Japanese descent. Additionally, Takahashi was discriminatorily told by Escobar that there were no teaching positions available. Yet, two young Caucasian males were told otherwise upon the same inquiry, clearly demonstrating Escobar's bias against Takahashi, a female, over the age of forty, and an American of Japanese descent. These acts clearly violate public policy, and public policy dictates that a trial be held on the merits.

What is more, the court must note that the integrity of teaching credentials/licenses has been seriously undermined by the acts of LUSD and Escobar. When Pena was hired without credential, LUSD sanctioned the employment of those who had yet to establish themselves as qualified educators, all to the detriment of this nation's children.

The education of the nation's children and the future of this nation desperately depend upon such a trial to weed out and eradicate the improper biases of public school administrators and employers. Furthermore, it is imperative that this court send a message to public school

administrators and employers that discrimination in employment will not be tolerated.

CONCLUSION

The petition for a writ of certiorari should be granted in order to address the issues presented, which are of extreme importance to the nation's legal and educational systems.

Respectfully submitted.

Mitsue Takahashi
Pro Se

November 21, 1996

APPENDIX A

MITSUE TAKAHASHI,
Plaintiff-Appellant,

v.

LIVINGSTON UNION SCHOOL DISTRICT,
et al.,
Defendants-Respondents.

No. S054362.

Supreme Court Of California.

Decided August 14, 1996.

Appellant's petition for review DENIED.

/s/ Ronald M. George
Chief Justice

APPENDIX B

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MITSUE TAKAHASHI,
Plaintiff-Appellant,

v.

LIVINGSTON UNION SCHOOL DISTRICT, *et al.*,
Defendants-Respondents.

No. F022345.

California Court Of Appeals, Fifth Appellate District.

Submitted April 5, 1996.

Decided May 13, 1996.

APPEAL from a judgment of the Superior Court of Merced County. Dennis A. Cornell, Judge. Brian K. Ross for Plaintiff and Appellant. Breon, O'Donnell, Miller, Brown & Dannis, Nancy B. Bourne and Brant T. Lee for Defendants and Respondents.

OPINION

INTRODUCTION

MARTIN, Justice:

Plaintiff Mitsue Takahashi was a teacher with the Livingston Union School District (District) for 21 years. On May 18, 1978, Takahashi's principal, Dale Eastlee, gave her an evaluation which set forth several areas of teaching and classroom deficiencies. These deficiencies included lack of classroom and pupil control.

In an April 1979 formal evaluation of plaintiff's performance, the District identified lack of student control and classroom management as serious problems. In a letter dated April 23, 1979, school Superintendent Harold Thompson gave plaintiff notice under Education Code section 44938 (unprofessional conduct and competency). Thompson stated specific areas of administrative concern with respect to plaintiff's deficiencies in teaching and classroom responsibilities. These deficiencies included lack of classroom and pupil control, inadequate methods and techniques for teaching, failure to maintain adequate teacher/parent relations. The notice contained seven separate instances of perceived deficient performance on plaintiff's part. Thompson attached a copy of the formal evaluation to the 90-day notice. The notice also provided the specific instances were considered of such significance that plaintiff's failure to correct the faults might result in the District filing charges of dismissal against her.

On November 15, 1979, the District conducted a further evaluation of plaintiff's job performance (Ed. Code, § 44664). The

evaluation noted several deficiencies and further noted plaintiff had not implemented a variety of suggestions to improve instruction and classroom management. The evaluation recommended dismissal if the deficiencies were not significantly corrected.

In a letter dated January 8, 1980, Superintendent Thompson notified plaintiff the concerns expressed in the April 23, 1979, letter had continued. Thompson also cited six more instances of conduct over which the District expressed concern. He stated:

> "Please be assured, the administration will continue to offer you assistance, however, the foregoing constitutes incompetence of such a degree that your failure to correct these faults may result in the district filing charges of dismissal in accordance with Education Code Provisions."

On May 12, 1980, Superintendent Thompson sent plaintiff a statement of charges (Ed. Code, § 44932, subd. (d)) which identified 19 specific charges and stated cause existed to dismiss plaintiff as a permanent certified employee of the District for incompetence. Upon receiving the May 12 notice, plaintiff requested a hearing under Education Code section 44944 (conduct of dismissal or suspension proceeding). The District Commission of Professional Competency (Commission) conducted the hearing on October 21-23, 1980. On November 6, 1980, the Commission sustained the charges and found plaintiff incompetent to teach.

On December 2, 1980, plaintiff filed a petition for writ of mandate in Merced County Superior Court seeking review of the Commission's decision. On June 9, 1981, the

superior court sustained the decision, finding plaintiff incompetent to teach. Plaintiff filed a notice of appeal on August 5, 1981, and this court affirmed the trial court's decision in *California Teachers Assn. v. Governing Board* (1983) 144 Cal.App.3d 27 certiorari denied 465 U.S. 1008.

On November 10, 1983, plaintiff filed an action in the United States District Court for the Eastern District of California for damages and injunctive relief based on 42 United States Code sections 1981 and 1983. However, the district court held the decision in the first action precluded plaintiff's federal court case. The United States Court of the Appeals for the Ninth Circuit affirmed that holding in *Takahashi v. Bd. of Trustees of Livingston* (9th Cir. 1986) 783 F.2d 848, certiorari denied 476 U.S. 1182.

On November 15, 1982, plaintiff filed a complaint against the District and individual defendants in Merced County Superior Court alleging causes of action for breach of employment contract and conspiracy to defraud, praying for monetary relief. On March 31, 1983, plaintiff filed a separate complaint in the same court alleging civil rights violations and seeking monetary, injunctive, and declaratory relief. The court later consolidated the cases and granted the District and individual defendants summary judgment, finding the previous state and federal litigation barred these actions under the doctrine of res judicata. Plaintiff again appealed and this court affirmed the summary judgment in a published opinion, *Takahashi v. Board of Education* (1988) 202 Cal.App.3d 1464, certiorari denied 490 U.S. 1011.

Among other things, we held (1) the primary right involved in the later cases was

the same as that in the first action; (2) a remedy of the Fair Employment Practices Act did not prevent the judgment in the first action from being res judicata; (3) the final judgment in the first action was res judicata as to all issues that were or could have been litigated in that action; (4) all defenses could have been asserted at the time of the administrative hearing before the State Fair Employment and Housing Commission and claims could have been brought in the first action; and (5) the federal decision was res judicata.

On August 23, 1989, plaintiff filed a complaint in Merced County Superior Court for damages for alleged legal negligence, breach of fiduciary duty, and negligent infliction of emotional distress against her former counsel, Ernest H. Tuttle III. Plaintiff claimed all three causes of action arose out of Tuttle's alleged actions or omissions during the administrative and mandamus proceedings which occurred approximately six years earlier. the Merced County Superior Court granted defendant's motion for summary judgment and plaintiff appealed. We affirmed in an unpublished opinion (*Takahashi v. Tuttle* (Sept. 7, 1994, No. F018928)), holding plaintiff's cause of action for legal negligence to be time barred.

STATEMENT OF THE CASE

On June 25, 1993, plaintiff filed a complaint for monetary damages in Merced County Superior Court. Plaintiff named Livingston Union School District (District) and District Assistant Superintendent Henry Escobar as defendants, alleging causes of action for employment discrimination and discrimination under the color of law, and prayed for back pay with interest and general, special, and punitive damages, among other things.

On July 8, 1994, defendants moved for summary judgment (Code Civ. Proc. § 437c) on the grounds (1) plaintiff could not establish a prima facie case of discrimination as a matter of law because she was not qualified for the position and no position was available and (2) even assuming arguendo plaintiff established a prima facie case, defendants had a legitimate nondiscriminatory reason for not hiring plaintiff.

On August 8, 1994, the court conducted a contested hearing and filed a minute order granting summary judgment in favor of defendant. Thereafter, on August 26, the court filed a formal order for entry of summary judgment, stating in relevant part:

> "The court finds that plaintiff has failed to state a prima facie case of race, sex or age discrimination in that plaintiff was not qualified for the position for which she applied at Livingston Union School District and therefore cannot meet the third element of the prima facie case under *McDonnell Douglas v. Green* (1973) 411 U.S. 49 at 792 [*sic*]. Therefore, judgment should be entered in favor of defendants against plaintiff. The court further finds that even had plaintiff been able to state a prima facie case for discrimination, summary judgment would be entered in favor of defendants and against plaintiff because plaintiff has presented no evidence of discrimination to support her argument that defendants' legitimate and nondiscriminatory reasons for its action in not considering plaintiff's application for employment were pretextual.

> "Having made the findings stated above, the court then concludes that there is no triable issue of any material fact with respect to plaintiff's failure to present evidence that defendants' reasons for their action were pretextual, and therefore defendants are entitled to judgment as a matter of law."

On September 7, 1994, the superior court entered summary judgment in favor of defendants. Plaintiff filed a timely notice of appeal.[1]

FACTS

In early 1991, several teaching positions were available at the District. A "CERTIFICATED ANNOUNCEMENT," dated March 18, 1991, listed positions for both a seventh and eighth grade "General Science Teacher" and a seventh and eighth grade "Mathematics Teacher." The announcement listed "Spanish speaking ability" as a desirable professional qualification.

On April 26, 1991, plaintiff attended the Merced County Teachers' Job Faire. Defendant

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1 An order granting a motion for summary judgment, entire or partial, is a preliminary nonappealable order. Appeal must be taken from the final judgment ultimately entered in the case. (*King v. State of California* (1970) 11 Cal.App.3d 307, 310.) Here, plaintiff erroneously appeals from the minute order filed August 8, 1994, rather than the summary judgment entered September 7, 1994. Where the trial court renders a summary judgment, the appellate court may treat an appeal from a preliminary order as an appeal from the subsequent judgment. (*Avila v. Standard Oil Co.* (1985) 167 Cal.App.3d 441, 445; Code Civ. Proc. § 437c, subd. (l).) We do so here.

District was one of the participating entities. At the job faire, plaintiff asked defendant Escobar whether District had classroom teaching positions available. Escobar said no such positions were available. Shortly after her inquiry, plaintiff overheard Escobar tell two young Caucasian males there were two classroom teaching positions available. Plaintiff then asked Escobar's assistant, Carol Campbell, about the availability of classroom teaching positions. Campbell said there were available positions in general seventh and eighth grade mathematics and science.

Plaintiff told Campbell she had filed an application with the District prior to the job faire. Campbell said plaintiff needed only to provide the District with a copy of her Permanent Verification Card to complete her application. That card attested to the fact that plaintiff had passed the state teacher competency examination. Plaintiff made a photocopy of the card and returned to the District's table.

Campbell had left the table by the time plaintiff returned. Plaintiff explained to Escobar what Campbell had instructed her to do and offered him the photocopied Permanent Verification Card. Escobar declined to accept the copy, explaining he had too much to carry and suggested plaintiff bring the document to the District offices the following Monday morning. Plaintiff's husband took the photocopied card and an updated application form to the District's offices the following Monday and gave both documents to Campbell.

Plaintiff's application was stamped "RECEIVED APR 29 1991" and placed in the District's file. Plaintiff attached a letter to Escobar, dated April 26, 1991, to the

application. The words, "HAND DELIVERED TO THE LIVINGSTON DISTRICT OFFICE BY MY SPOUSE ON APRIL 29, 1991 (8:30 AM)." appeared at the top of the cover letter. The first paragraph of the letter read:

> "Thank you for talking to me today at the Job Fair about the two job openings for teachers for 7th-8th grade mathematics and for 7th-8th grade science each with 1 period of language arts, and also for assuring me that this application form would be honored."

Notwithstanding the fact plaintiff applied for the two junior high school classroom teaching positions available in 1991, the District did not consider her applications because she had been dismissed for incompetence in 1980. By letter dated June 3, 1991, plaintiff requested an informational letter regarding her application. Escobar responded by letter dated June 5, 1991. He informed plaintiff she was not one of the candidates chosen and that all positions had been filled.

Plaintiff concedes the District's three-member Commission on Professional Competence dismissed her for alleged incompetence as a teacher in 1980. However, the Commission's determination was not unanimous. Karyl (Cindi) Rubin, the teacher/member of the Commission, found plaintiff was competent to teach. Rubin specifically disagreed with findings XIII and XIV of the decision, which addressed plaintiff's alleged failure to exercise classroom control.

On or about February 19, 1985, the Committee of Credentials of the State Commission on Teacher Credentialing (Committee) determined no probable cause existed for the suspension or revocation of plaintiff's teaching credentials.

The Committee issued this determination despite the District's dismissal of plaintiff for incompetence.

At the time of her 1991 application for the junior high school positions, plaintiff possessed the following qualifications:

1. Plaintiff successfully completed and passed the state teacher competency examination, the California Basic Education Skills Test (CBEST), on or about December 9, 1989, and had received a Permanent Verification Card.

2. Plaintiff received two life diplomas from the California State Board of Education and possessed life teaching credentials to teach in all grades of any public secondary school, in the seventh and eighth grades, and in any public elementary school.

3. Plaintiff had taken extensive courses in computer science at California State University, Stanislaus, focusing on instruction in elementary and secondary schools.

4. Plaintiff had approximately 21 years of teaching experience as a junior high school mathematics teacher in the District.

5. Plaintiff possessed a Masters Degree in mathematics education.

6. Plaintiff possessed a Bachelor of Arts Degree in science from Stanford University.

7. Following her 1980 dismissal, plaintiff had taken Spanish language courses at Merced College and had taken similar courses at California State University, Stanislaus, sometime in the 1970's.

8. Plaintiff had taught in Spanish on a limited basis during her teaching career.

On July 22, 1994, plaintiff's attorneys took District Superintendent Harold Thompson's deposition. At that deposition, Thompson said he had previously met with Antonio Aguilar, Senior Consultant with the Fresno Office of the Department of Fair Employment and Housing (DFEH). The pair discussed the District's alleged discriminatory practices as set forth in plaintiff's DFEH complaint. After that meeting, Aguilar and Thompson walked to the latter's automobile. Thompson allegedly told Aguilar persons of Japanese descent tend to be "quiet" and "not assertive."

Although the deposition was not available at the time plaintiff filed her opposition papers to summary judgment, Aguilar verified the content of the conversation in a declaration based on his personal knowledge. Aguilar declared that Thompson said plaintiff "would have problems overcoming her alleged teaching difficulties because the Japanese tend to be too 'quiet' and 'not assertive.'" Thompson also said the District hesitated to take action against plaintiff because of potential repercussions from the Japanese-American community in the Livingston area. Thompson said that ethnic community had much "clout."

Thompson and Escobar were responsible for staff recruitment in the District at the time plaintiff applied for the two junior high school positions in 1991. The mathematics position never became available because the incumbent did not leave the District's employ as originally anticipated. The person hired to fill the science position was fully bilingual in Spanish. At deposition, plaintiff admitted she was not conversant in the Spanish language. Federal law

requires school districts ensure equal opportunity for limited-English-proficient (LEP) students. The District adopted and submitted to the State Department of Education a plan to remedy the District's shortage of qualified teachers for its LEP programs. This plan was in effect in 1991 and included specific recruitment provisions encouraging the employment of Portuguese, Spanish, and Punjabi-bilingual candidates.

In 1991, out of 219 LEP students in the seventh and eighth grades, 199 spoke primarily Spanish. At the same time, the District had only one junior high school teacher who was Spanish-bilingual and one teacher working with a Spanish-bilingual aide. By 1993, 207 out of 235 LEP students in the seventh and eighth grades spoke primarily Spanish. At that time the District had three Spanish-bilingual teachers and three teachers working with Spanish-bilingual aides.

DISCUSSION

I. DID THE TRIAL COURT ERRONEOUSLY GRANT SUMMARY JUDGMENT?

Plaintiff contends the trial court erroneously granted summary judgment because there are triable issues of material fact as to (1) her qualifications for the positions for which she applied; (2) her alleged incompetence as a teacher; and (3) the pretextual nature of the defendants' reasons for not considering her application.

Summary judgment is proper if the supporting papers are sufficient to sustain a judgment in favor of the moving party as a matter of law and the opposing party presents no

evidence giving rise to a triable issue as to any material fact. (Code Civ. Proc. § 437c, subd.(c).) For the defendant to prevail on a summary judgment motion, it must conclusively negate a necessary element of the plaintiff's case or establish a complete defense. (*Horsemen's Benevolent & Protective Assn. v. Insurance Co. of North America* (1990) 222 Cal.App.3d 816, 820.)

When the plaintiff pleads several theories, a defendant successfully meets his or her burden on a summary judgment motion by providing evidence which negates each of plaintiff's claims. (*Rochlis v. Walt Disney Co.* (1993) 19 Cal.App.4th 201, 218, disapproved on another point in *Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1248-1251.) A cause of action has no merit if either of the following exists: (1) one or more of the elements of the cause of action cannot be separately established, even if that element is separately pleaded or (2) a defendant establishes an affirmative defense to that cause of action. (Code Civ. Proc., § 437c, subd.(n).) A plaintiff may not rely upon the mere allegations or denials of its pleadings to show a triable issue of material fact exists. Instead, plaintiff shall set forth the specific facts showing a triable issue of material fact exists as to that cause of action or a defense thereto. (Code Civ. Proc., § 437c, subd.(o)(2).)

As a summary judgment motion raises only questions of law concerning the construction and effect of the supporting and opposing papers, on appeal we review directly the papers submitted in connection with the motion. (*Walker v. Blue Cross of California* (1992) 4 Cal.App.4th 985, 990.) Where the evidence presented by defendant does not support judgment in his or her favor, the motion must be denied without looking at the

opposing evidence, if any, submitted by plaintiff. (*Albertini v. Schaefer* (1979) 97 Cal.App.3d 822, 831.) The evidence of the moving party is strictly construed and that of the opposing party liberally construed. (*Coppola v. Superior Court* (1989) 211 Cal.App.3d 848, 862.)

Where there is no material issue of fact to be tried and the sole question before the court is one of law, it is the duty of the trial court on a motion for summary judgment to hear and determine the issue of law. (*Rombalski v. City of Laguna Beach* (1989) 213 Cal.App.3d 842, 848.) In reviewing a grant of summary judgment, an appellate court must make its own independent determination of the construction and effect of the papers submitted. (*Saldana v. Globe-Weis Systems Co.* (1991) 233 Cal.App.3d 1505, 1513-1515; *Preis v. American Indemnity Co.* (1990) 220 Cal.App.3d 752, 757.)

In the instant case, plaintiff sued for relief under the California Fair Employment and Housing Act (Gov. Code, § 12900 et seq.) and title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.). The California Fair Employment Practices Act was enacted in 1959 and recodified in 1980 as part of the Fair Employment and Housing Act (FEHA). The FEHA prohibits job discrimination on specified grounds, including age, race/ancestry, and sex (Gov. Code, § 12921). FEHA has its federal counterpart in title VII. Since the antidiscrimination objectives and public policy purposes of the two laws are the same, we may rely on federal decisions to interpret analogous parts of the state statute. (*Sandhu v. Lockheed Missiles & Space Co.* (1994) 26 Cal.App.4th 846, 851.)

To preclude summary judgment in the instant case, plaintiff must establish a prima facie case of discrimination which gives rise to a genuine issue of material fact. (*Pejic v. Hughes Helicopters, Inc.* (9th Cir. 1988) 840 F.2d 667, 672; *Fong v. American Airlines, Inc.* (9th Cir. 1980) 626 F.2d 759, 761.) A prima facie case of employment discrimination through disparate treatment is established if the plaintiff shows: (i) she belongs to a protected class; (ii) she applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite her qualifications, she was rejected; and (iv) that, after her rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. (*McDonnell Douglas Corp. V. Green* (1973) 411 U.S. 792, 802; *Clark v. Claremont University Center* (1992) 6 Cal.App.4th 639, 662-663.)

Traditionally, discrimination cases have been legally analyzed as "a sort of game of 'hot potato.'" The plaintiff would first have the burden of showing a prima facie case of discrimination. If the plaintiff succeeded, the defendant would then have the burden of showing a nondiscriminatory reason for the way the defendant treated plaintiff. If the defendant failed to carry that burden, plaintiff won. If the defendant succeeded, the burden would then shift back to the plaintiff to show that the defendant's reason was only a "pretext" for discrimination. The case would finally turn on whether the plaintiff succeeded in showing the nondiscriminatory reason was such a pretext. (*Green v. Rancho Santa Margarita Mortgage Co.* (1994) 28 Cal.App.4th 686, 694-695.) Nevertheless, the trier of fact's rejection of the employer's asserted reasons for its actions does not compel a finding for the plaintiff. Rather, plaintiff at all times bears the

ultimate burden of persuasion and must prove the defendant intentionally discriminated against him or her. The factfinder's disbelief of the defendant's reasons, combined with a suspicion of mendacity and the elements of the prima facie case, may suffice to show such discrimination. (*St. Mary's Honor Center v. Hicks* (1993) 509 U.S. 502, 113 S.Ct. 2742, 2748-2749.)

To show a prima facie case of discrimination, a plaintiff must offer evidence giving rise to an inference of unlawful discrimination. The evidence may be either direct or circumstantial. The amount of evidence that must be produced in order to create a prima facie case is "very little." Normally, when such evidence has been introduced, a court should not grant summary judgment to the defendant on any ground relating to the merits. Summary judgment is normally inappropriate even when the defendant articulates a legitimate, nondiscriminatory reason for the challenged employment decision, thus shifting the burden to the plaintiff to prove the articulated reason is pretextual. When a plaintiff has established a prima facie case inference of disparate treatment through direct or circumstantial evidence of discriminatory intent, he or she will necessarily have raised a genuine issue of material fact with respect to the legitimacy or bona fides of the employer's articulated reason for its employment decision which, in turn, will ordinarily preclude the granting of summary judgment. (*Sischo-Nownejad v. Merced Community College Dist.* (9th Cir. 1991) 934 F.2d 1104, 1110-1111.)

Although the burden of proof in an employment discrimination action ultimately rests with the plaintiff, in the case of a motion for summary judgment, the burden rests

upon the moving party to negate the plaintiff's right to prevail on a particular issue. On a defendant's motion for summary judgment, as contrasted to a trial, the defendant cannot rely on the plaintiff's failure to produce evidence establishing a prima facie case of discrimination. Rather, the defendant must present evidence negating a claim of disparate treatment or establishing an undisputed legitimate, nondiscriminatory basis for plaintiff's rejection. (*Valdez v. City of Los Angeles* (1991) 231 Cal.App.3d 1043, 1051.)

Defendants moved for summary judgment below on the following basis:

> "The reason the District never considered the plaintiff's application for employment in 1991 is that the plaintiff was terminated from a teaching position with the District for incompetency in 1980. Pursuant to the extensive and detailed procedural protections set forth in the Education Code for this kind of termination, a Commission on Professional Competence had been duly convened, and had determined that plaintiff should be terminated for incompetency. On mandamus review, this Superior Court, exercising independent judgment of the evidence, also determined that plaintiff should be terminated for incompetency. This decision was upheld on appeal, and both the State and United States Supreme Courts denied review.
>
> ".....
>
> "In 1991 this same plaintiff applied for a teaching job with the very school district which initially terminated her for incompetency. The District reasonably

did not consider her application. The plaintiff is manifestly not qualified to be a teacher for the District. No fewer than three separate appellate opinions have upheld the [D]istrict's determination in 1980, and the independent conclusion of the trial court, that she be terminated. The District can be under no obligation to consider for employment a former employee whom the District has already terminated."

In opposing the motion, plaintiff initially conceded that she could not "relitigate the issue that she was lawfully terminated for incompetency." She emphasized she was not seeking to relitigate that issue. Rather, she maintained defendant's reliance on the incompetency determination was "simply a pretext for the national origin, age and/or gender discrimination perpetrated by LUSD in 1980 and 1991." As previously noted, the lower court ruled there was no triable issue of any material fact with respect to plaintiff's failure to state a prima facie case for discrimination:

"The court finds that plaintiff has failed to state a prima facie case for race, sex or age discrimination in that plaintiff was not qualified for the position for which she applied at Livingston Union School District and therefore cannot meet the third element of the prima facie case under *McDonnell Douglas v. Green* (1973) 411 U.S. 49 at 792 [*sic*]. Therefore, judgment should be entered in favor of defendants against plaintiff. The court further finds that even had plaintiff been able to state a prima facie case for discrimination, summary judgment would be entered in favor of defendants and against plaintiff

because plaintiff has presented no evidence of discrimination to support her argument that defendants' legitimate and nondiscriminatory reasons for its action in not considering plaintiff's application for employment were pretextual."

On appeal, defendant District contends plaintiff could not establish a prima facie case of discrimination in 1991 because she was not qualified as a matter of law: "Here, the appellant is not qualified for a junior high school teaching position with the District as a matter of law, because *she was previously terminated by the District from the same position for incompetency.*"

The parties implicitly acknowledge there is no California case authority on this point. Absent such authority, plaintiff argues her 1980 dismissal for incompetence and her 1991 qualifications for general seventh and eighth grade mathematics and science positions raise triable issues of material fact. Defendant nevertheless insists plaintiff's 1980 dismissal for incompetency precluded her from qualifying for the similar 1991 positions and cites to two federal cases in support of the grant of summary judgment. (*Wilson v. McDaniel* (M.D.N.C. 1991) 54 Fair Empl. Prac. Cas. (BNA) 1499 [57 Empl. Prac. Dec., (CCH) Paragraph 11,222], affd. (4th Cir. 1991) 935 F.2d 1284; *Mira v. Monroe County School Bd.* (S.D.Fla. 1988) 687 F.Supp. 1538.)

Federal decisions are not controlling in matters of state law. (*Estate of D'India* (1976) 63 Cal.App.3d 942, 948.) Although we are bound by interpretations of federal statutes by the United States Supreme Court, decisions of the lower federal courts on federal questions are merely persuasive. (*Spellman v. Securities, Annuities & Ins. Services, Inc.* (1992) 8

Cal.App.4th 452, 459.) However, where the material provisions of a federal statute and a state or of the federal government, which has been judicially construed, there is a very strong presumption of intent to adopt the construction as well as the language of the prior enactment. (*Douglas v. State of California* (1942) 48 Cal.App.2d 835, 838.) Discrimination lawsuits under the California FEHA are analogous to federal title VII claims and are evaluated under federal law interpreting title VII cases. (*Okoli v. Lockheed Technical Operations Co.* (1995) 36 Cal.App.4th 1607, 1614, fn.3; *University of Southern California v. Superior Court* (1990) 222 Cal.App.3d 1028-1035.)

In *Wilson v. McDaniel, supra,* plaintiff, a black woman, was employed by the Winston-Salem/Forsyth County Schools as a teacher's aide. During the 1986-1988 school years, Wilson was assigned to Latham Elementary school as an aide in Particia Bitting's kindergarten classroom. Bitting was also a black female. During the 1987-1988 school year, Bitting complained to defendant McDaniel, the school principal, about plaintiff's poor job performance and asked that Wilson be reassigned. At the end of the school year, plaintiff voluntarily signed a request for transfer and McDaniel reassigned her to a "Behaviorally Emotionally Handicapped" (BEH) classroom at Latham. The duties of a BEH aide were essentially the same as that of a kindergarten aide and the pay was the same. Wilson performed satisfactorily in the BEH classroom. At the time of the transfer, there were no positions available in other kindergarten classrooms. After the 1988-1989 school year began, an aide's position opened in a Latham kindergarten classroom. Wilson asked McDaniel to transfer her to this position but he had already selected a white female to fill the position. Unknown to

Wilson, McDaniel had considered her for the position but decided against her because of her past problems in Bitting's classroom and because two other kindergarten teachers said they did not want her in their classrooms because of her prior poor job performance. Wilson filed an Equal Employment Opportunity Commission (EEOC) Charge of Discrimination against the school, alleging McDaniel denied her the transfer because of her race in violation of title VII. The EEOC determined there was no discrimination. She filed suit and the United States District Court granted summary judgment for the school.

Wilson's evidence failed to establish a prima facie case of discrimination under the *McDonnell Douglas* scheme. Although Wilson was a member of a protected class, she only offered her own unsupported assertions that she was qualified for but was denied a kindergarten aide position. Even if Wilson had established a prima facie case, McDaniel offered a legitimate, nondiscriminatory reason for the employment action--prior poor job performance in the job sought. The district court held defendant was required to present rebuttal evidence to show McDaniel's proffered reason was pretextual or unworthy of credence. Wilson offered nothing but her conclusory and unsupported opinion that McDaniel's true motivation for denying her the transfer was discrimination. This showing was insufficient to survive summary judgment.

In *Mira v. Monroe County School Bd.*, supra, 687 F.Supp. 1538, defendant appointed plaintiff, a school bus driver, assistant director of transportation of the Monroe County School District. Plaintiff served in that position from 1978 through 1981. During that period, plaintiff did a competent job running the transportation department but had serious problems in her relationships and dealings with

other school district personnel. In July 1981, the district abolished defendant's job due to a cut in federal funding and plaintiff remained in the employ of defendant board as a bus driver and transportation supervisor. In June 1984, the board reinstated the position of assistant director of transportation and plaintiff applied for the job. The district officer responsible for overall management of noninstructional departments declined to promote plaintiff because of the many personnel problems she caused during her previous tenure. The managing officer instructed his subordinate--the director of maintenance, transportation, and custodians--to give courtesy interviews to plaintiff and four other applicants but suggested a sixth applicant was the only qualified candidate. The board extended an offer of employment to the latter but he ultimately declined and the district did not fill the position. A few months later, the district contracted with a retired district employee--a male--to supervise and direct the district's transportation department. In June 1986, he left his position. One month later, a ten-year employee of the district--another male--became supervisor of transportation and the position of assistant director of transportation was never filled. Defendant filed a sex discrimination complaint in United States District Court and the court ruled she had failed to prove a title VII violation by a preponderance of evidence.

Discrimination consists of treating like cases differently. The evidence showed a male applicant was treated exactly the same as was plaintiff in similar circumstances. Even assuming plaintiff proved her prima facie case, defendant came forward with an abundance of legitimate, nondiscriminatory reasons for failure to promote. The evidence clearly showed plaintiff was not promoted to the assistant

director of transportation position because of her poor supervisory performance in the same position during 1978-1981. During that period, the district officer responsible for overall management received numerous complaints from employees, principals, and administrators regarding plaintiff's abrasive disposition, her lack of diplomacy, and generally inadequate interpersonal abilities. That officer credibly testified the sole reason he did not promote plaintiff to assistant director of transportation in 1984 was that he did not believe plaintiff possessed the necessary interpersonal skills to properly perform the duties of assistant director of transportation. the officer based his belief on plaintiff's poor job performance in the position.

In the instant appeal, plaintiff concedes the foregoing federal cases may be cited as precedent. However, she contends each case is distinguishable from the case at bar. She maintains she produced far more evidence of qualification, discrimination, and pretext than the plaintiff in *Wilson*. Moreover, she points out *Mira* involved a bench trial not subject to the special rules and procedures applicable to summary judgment proceedings. Although she acknowledges the facts in *Mira* and *Wilson* are similar to those here, she vigorously contends the federal precedents are distinguishable on evidentiary or procedural grounds and are inapplicable to her case.

She specifically contends defendants are attempting to divert the focus of this court from considering her extensive resume:

> "They are using the incompetency finding as a tool by which to accomplish said diversion. In 1991, respondents completely ignored the possibility that

appellant may have cured any teaching deficiencies that were alleged to have existed in 1980. They steadfastly argue that, since they found appellant incompetent eleven years earlier, she was incompetent in 1991. In other words, once appellant was found incompetent, she would forever be incompetent in the eyes of the respondents.

"Appellant contends that a factual issue exists as to whether she was competent (qualified) to teach at the time she applied for the teaching positions. The assertion that she will be considered forever incompetent is irrational. Deficiencies can be corrected. Education Code §44938(b)(1), inapplicable to this matter, but informative, specifically requires that a teacher be given an opportunity to correct his/her faults. Indeed, once respondents accepted appellant's application, they created a reasonable expectation on her part that an independent investigation of her qualifications would be conducted."

Plaintiff argues an assessment of her qualifications should have been made in 1991 because on February 19, 1985, a Committee of Credentials of the State Commission on Teaching Credentialing determined no probable cause existed for the suspension or revocation of plaintiff's credentials despite her dismissal by defendant District.

The distinction between teacher dismissal and license revocation proceedings is well recognized. (*Gardner v. Commission on Professional Competence* (1985) 164 Cal.App.3d

1035, 1039.) this court's predecessor noted more than one-half century ago:

> "The teacher is entrusted with the custody of children and their high preparation for useful life. His habits, his speech, his good name, his cleanliness, the wisdom and propriety of his unofficial utterances, his associations, all are involved... In occupations involving a high degree of personal, as distinguished from mechanical or technical service, specification of acts of unfitness are wholly impossible and have never been attempted... Cannot the legislature likewise provide for the dismissal of a teacher, from a particular employment, for such actions as in the sound discretion of the Board of Education amounts to "unprofessional conduct"? It would seem clear that it could. In both cases the dismissal has been only from a particular employment, leaving the person dismissed free to prosecute his professional employment elsewhere. There is an undeniable difference between the qualification of a man for the general practice of a profession and his fitness for some particular employment. Transient and local causes may render him undesirable in the latter case although his general fitness might be conceded. There is a vast difference between the right of a board to take away a man's right to practice a profession by revoking his license and subjecting him to dismissal from a single employment after he has become subject to a substantial objection of his employer." (*Johnson v. Taft School Dist.* (1937) 19 Cal.App.2d 405, 407-408, quoting *Goldsmith v. Board*

of Education (1924) 66 Cal.App. 157, 168-171.)

On appeal in the instant case, defendant District does not contend plaintiff is unfit to hold any certificated position whatsoever and that her credential should therefore be revoked. Nor does the District contend plaintiff, if employed, would endanger the safety and welfare of students. Rather, defendant District simply contends plaintiff's prior dismissal from the same position for incompetency "serves not only to undermine the appellant's qualifications for the position, but to establish a legitimate, nondiscriminatory reason for appellant's rejection."

Despite the holdings of *Mira* and *Wilson* and the long-standing distinction between teacher dismissal and license revocation, plaintiff contends a factual dispute exists as to her qualifications for the classroom teaching positions she applied for in 1991. The degree of proof necessary to establish a prima facie case for title VII claims on summary judgment is minimal and does not need to rise to the level of a preponderance of the evidence. However, even assuming arguendo plaintiff has produced the minimum evidence necessary to establish a prima facie case, this does not preclude summary judgment here. Where the prima facie case consists of no more than the minimum necessary to create a presumption of discrimination under *McDonnell Douglas*, plaintiff has failed to raise a triable issue of fact. The plaintiff must do more than establish a prima facie case and deny the credibility of the defendant's witnesses. In response to the defendant's offer of nondiscriminatory reasons, the plaintiff must produce specific, substantial evidence of pretext. When evidence to refute the

defendant's legitimate explanation is totally lacking, summary judgment is appropriate even though plaintiff may have established a minimal prima facie case. (*Wallis v. J.R. Simplot Co.* (9th Cir. 1994) 26 F.3d 885, 889-891.)

Here, the District refused to consider plaintiff for employment in 1991 for two reasons: (1) her termination for incompetency in 1980 and (2) the superior bilingual qualifications of the successful candidate. Plaintiff points out bilingual ability, although desirable, was not a requirement of employment and that her other qualifications--teaching credentials, successful completion of the state teacher's competency examination, and undergraduate major and degree--exceeded the successful candidate's qualifications at the time of application for employment.

A prima facie case of discrimination should not be confused with the prima facie showing on all elements of plaintiff's proof necessary to defeat a motion for summary judgment. The prima facie showing of discrimination only serves to force the defendant to articulate a legitimate explanation for the challenged action. Then, the plaintiff has the duty of exposing the discriminatory animus behind the employer's excuse. (*Carr v. F.W. Woolworth Co.* (E.D.N.C. 1992) 883 F.Supp. 10, 14-15, affd. (4th Cir. 1994) 42 F.3d 1385.) In other words, it is incumbent upon plaintiff to offer evidence demonstrating the existence of a triable material controversy as to whether defendant's stated reasons for the failure to hire were either untrue or a pretext for discrimination. (*University of Southern California v. Superior Court, supra,* 222 Cal.App.3d 1028, 1036-1037.)

A review of the instant record shows that no mathematics teaching position was available because the incumbent never left the employ of the District, as originally anticipated. Moreover, plaintiff admitted the District did not "hire" anyone to fill that position. As to the science position, Assistant Superintendent Henry Escobar declared the District hired Oscar Pena, "the top bilingual graduate from Fresno Pacific [College] in 1991." Escobar stated the District actively sought bilingual candidates with Spanish language proficiency. He explained the District "had a shortage of qualified Spanish bilingual teachers to meet the needs of the increasing number of Spanish-speaking students in the District [and] the State had ordered the District to create a Plan to Remedy th[is] shortage..."[2] Escobar described Pena, the successful candidate, as "a Mexican American with Spanish as a first language." Further, between December 1989 and August 1993, Pena earned internship and preliminary multiple-subject teaching credentials from the State Commission on Teacher Credentialing and passed the CBEST. Plaintiff had no information or contradictory evidence regarding the state ordering the District to develop a plan to remedy a bilingual teacher shortage. Although she had no knowledge as to Oscar Pena's native country, she admitted he had "Spanish bilingual experience." In contrast, at a June 20, 1994, deposition, plaintiff admitted she did not consider herself conversant in Spanish.

---

[2] At the time the District adopted its plan to remedy the shortage of qualified bilingual teachers, there were a total of 1,124 limited-English proficiency (LEP) students in the entire District. Out of that number, 961 spoke Spanish as a primary language.

To prevail on defendants' summary judgment motion, plaintiff must have some proffer of evidence which reaches beyond mere speculation and conjecture and which could support an inference that the District's decision was other than a business decision and impermissably based on national origin, gender, or age. (See *Carr v. F.W. Woolworth Co.*, *supra*, 883 F.Supp. at p. 15.) Here plaintiff contended below:

> "The real motivation behind the defendants['] refusal to consider TAKAHASHI's application was age, gender and/or national origin discrimination. At the Job Faire, TAKAHASHI was told by ESCOBAR that no classroom teaching positions were available. He turned around and told two (2) Caucasian males that there were such positions. [In 1982 District Superintendent Harold] THOMPSON also indicated that one's Japanese ancestry would affect his or her teaching abilities. That mentality obviously played a role in the decision not to consider TAKAHASHI's application. (THOMPSON was LUSD Superintendent at the time TAKAHASHI's application was rejected[.])"

As to the job faire remarks, Escobar testified at a June 15, 1994, deposition, "We don't consider applications, we don't consider candidates who are considered to be incompetent and who have been dismissed by the district. Those are not considered for reemployment." As to Superintendent Thompson's alleged remark, defendants properly point out the alleged statement has no nexus to the instant claim. Even if the plaintiff could prove Thompson was biased against her in 1982, she has not made

"some proffer of evidence which reaches beyond speculation and conjecture" to show a connection with the District's decision not to consider her 1991 application for employment. (*Carr v. F.W. Woolworth Co., supra*, 883 F.Supp. at p. 15.)

Absent plaintiff's production of specific, substantial evidence of pretext, the lower court properly granted defendants' motion for summary judgment.

II. DID THE TRIAL COURT MAKE ERRONEOUS EVIDENTIARY RULINGS?

Plaintiff contends the trial court erroneously struck portions of declarations referring to Superintendent Thompson's alleged discriminatory remark from 1982 and Assistant Superintendent Escobar's alleged remarks about job vacancies made at the April 26, 1991, teacher job faire.

Code of Civil Procedure section 437c, subdivision (c) provides:

> "The motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. In determining whether the papers show that there is no triable issue as to any material fact the court shall consider all of the evidence as set forth in the papers, except that to which objections have been made and sustained by the court, and all inferences reasonably deducible from the evidence, except

> summary judgment shall not be granted by the court based on inferences reasonable deducible from the evidence, if contradicted by other inferences or evidence, which raise a triable issue as to any material fact."

Under the summary judgment statute, supporting and opposing declarations shall be made on personal knowledge, shall set forth admissible evidence, and shall show affirmatively the declarant is competent to testify to the matters stated therein. (Code Civ. Proc., § 437c subd.(d).) Evidentiary objections not made either in writing or orally at the hearing are deemed waived. (Code Civ. Proc., § 437c, subd. (b).) Appellate courts review summary judgments de novo and the parties remain free to press their admissibility arguments on appeal, the same as they did in the trial court. However, being able to identify particular flaws in the lower court's reasoning may have no great value because summary judgment must be upheld if correct on any ground--regardless of wrong "reasons" which may have guided the trial court. More generally, it is presumed on appeal a judge has not relied on irrelevant or incompetent evidence. (*Biljac Associates v. First Interstate Bank* (1990) 218 Cal.App.3d 1410, 1419-1420.)

In the instant case, Antonio Aguilar, a former senior consultant for the California DFEH, executed a declaration in opposition to the defense motion for summary judgment. Aguilar stated in relevant part:

> "2. In or about 1982, I conducted an investigation of alleged discriminatory practices by the LIVINGSTON UNION SCHOOL

DISTRICT in response to the complaint of plaintiff, MITSUE TAKAHASHI.

"3. During said investigation, I met with LIVINGSTON UNION SCHOOL DISTRICT's Superintendent, Harold Thompson. During said meeting, Mr. Thompson made several comments about the Japanese. Specifically, as to Ms. TAKAHASHI, he stated that she would have problems overcoming her alleged teaching difficulties because the Japanese tend to be too 'quiet' and 'not assertive.'

"4. Mr. Thompson's statements indicate that Ms. TAKAHASHI's Japanese ancestry was a factor bearing upon employment decisions (past and present) made regarding her by the LIVINGSTON UNION SCHOOL DISTRICT."

Defendants objected to this declaration on the grounds of lack of foundation, hearsay, relevance, and impermissible lay opinion. The lower court summarily sustained the objections at the August 8, 1994, hearing on motion for summary judgment.

Plaintiff's counsel Brian K. Ross also filed a declaration in opposition to the defense motion for summary judgment. Ross stated in relevant part:

"6. On July 22, 1994, I conducted the deposition of Harold Thompson, Superintendent of defendant LIVINGSTON UNION SCHOOL DISTRICT ['LUSD']. The transcript of said deposition could not be obtained at the time plaintiff's opposition papers to this motion were due, but will be available prior to the hearing on this matter. However, at said

deposition Mr. Thompson stated the following:

"a. That he had previously met with Antonio Aguilar, Senior Consultant of the Department of Fair Employment and Housing's Fresno Office ['DFEH'] for the purpose of discussing alleged discriminatory practices by LUSD as set forth in a DFEH complaint filed by MITSUE TAKAHASHI.

"b. After said meeting, as Mr. Thompson was on his way to his automobile, in response to Aguilar's questions, he stated to Mr. Aguilar that persons of Japanese de[s]cent tend to be 'quiet' and 'not assertive.'

"c. At the time MITSUE TAKAHASHI applied for the Science and Mathematics teaching positions in 1991, Assistant Superintendent HENRY ESCOBAR was responsible for deciding which applications would not be considered for employment."

Defendants objected to Ross's declaration on the grounds of lack of foundation, hearsay, mischaracterization of Thompson's testimony, and relevance. The court again summarily sustained the objections at the August 8, 1994, hearing on the motion.

As defendants properly point out, the alleged statement by Thompson was relevant to the 1980 termination but not to the 1991 failure to consider her application for employment. Under the doctrine of collateral estoppel, a second action between the same parties on a different cause of action is not precluded by a former judgment. However, the first judgment

operates as an estoppel as to such issues in the second action as were actually litigated and determined in the first action. (*McClain v. Rush* (1989) 216 Cal.App.3d 18, 28-29.) the doctrine of res judicata is distinguishable from collateral estoppel or issue preclusion. Collateral estoppel applies to issues rather than causes of action. A prior judgment operates as an estoppel or conclusive adjudication of the issues in a second suit that were actually litigated and determined in the first action. (*Taylor v. Hawkinson* (1957) 47 Cal.2d 893, 895-896; 3 Cal. Trial Practice: Civ. Proc. During Trial (Cont.Ed.Bar 3d ed. 1995) § 23.35, pp. 1366-1367.) In contrast, res judicata gives certain conclusive effect to a former judgment in subsequent litigation involving the same controversy. (*Nakash v. Superior Court* (1987) 196 Cal.App.3d 59, 67.) The doctrine bars a second suit arising out of the same factual situation, involving relevant matters which could have been raised in the first suit. (*Duffy v. City of Long Beach* (1988) 201 Cal.App.3d 1352, 1357-1358.)

In 1983, this court found sufficient evidence to support the District's 1980 termination of plaintiff's employment for cause. (*California Teachers Assn. v. Governing Bd.* (1983) 144 Cal.App.3d 27, 37-38.) In 1988, we held the final judgment in the 1983 action was res judicata as to all issues that were or could have been litigated in that action. (*Takahashi v. Board of Education* (1988) 202 Cal.App.3d 1464, 1481-1486.) Nothing in the instant record suggests a nexus between Thompson's alleged statement in 1982 and the District's 1991 decision not to consider plaintiff's application. In view of these facts and circumstances, the lower court properly

sustained the objections to the declarations of Aguilar and Ross.

Plaintiff filed a declaration in opposition to summary judgment and stated in relevant part:

> "[2.]...Specifically, my application was denied by LUSD in 1991 on the basis of my Japanese ancestry, my gender, and/or my age (over 40).
>
> "....
>
> "[3.]l. The COMMISSION determined that I was a successful teacher in 1980-81, the year of my dismissal. (See Exhibit B, Paragraph XV)
>
> "....
>
> "[3.]n. LUSD's teachers testified that the most difficult-to-manage students were assigned to my classes in my last year of teaching 8th graders (1979-1980) and the COMMISSION determined that I was successful in that teaching job.
>
> "....
>
> "[3.]p. In 1983, an investigator for the State Department of Fair Employment and Housing (Merlinda Gonzales) reported that my ancestry was at issue when decisions regarding my dismissal were made.
>
> "[3.]q. Despite LUSD's claim that I was an incompetent teacher, many others disagreed. Attached are just a sample of the letters written in support of my teaching abilities/methods during my

employment as an LUSD teacher. [Exhibit C to Declaration]

"[3.]r. On or about October 8, 1983, I attended a meeting with Antonio Aguilar, Senior Consultant with the Fresno Office of the Department of Fair Employment and Housing, and my attorney, Mary Louise Frampton, Esq. At said meeting, Mr. Aguilar stated that he had earlier spoken to LUSD Superintendent HAROLD THOMPSON...who had stated that LUSD believed I could not overcome my alleged teaching deficiencies due to my Japanese ancestry. THOMPSON told Aguilar that persons of Japanese ancestry tended to be quiet and not assertive. Ms. Frampton wrote a letter to me memorializing what was said by Mr. Aguilar during said meeting. [Exhibit D to Declaration]

"[3.]s. In 1985, the State Commission on Teacher Credentialing ruled that there was no probable cause for THOMPSON to make the accusation of 'incompetence.' [Exhibit JN-1 of Plaintiff's Request for Judicial Notice in Opposition to Summary Judgment]

"....

"7. ...I went to the Merced County Teacher Job Faire held on April 26, 1991. At the Faire, there were many tables for the various school districts in the County. I first approached the table for LUSD where ESCOBAR and an assistant, Carol Campbell...sat. I asked ESCOBAR whether there were any classroom teacher positions open. He said there were none, but there were openings for special positions, such as music teacher. I went around to other

> tables to look at their materials, and sat down at a table clustered in the middle. I happened to be close to the LUSD table and overheard ESCOBAR tell a couple of young Caucasian males that there were two (2) Junior High teacher job openings."

Defendants objected to the foregoing portions of the declaration on the grounds of lack of foundation, impermissible lay opinion, relevance, and mischaracterization of evidence. The trial court overruled defendants' objection to plaintiff's statement about being a successful teacher in 1980-1981. However, the court sustained defense objections to the remainder of the quoted portions of her declaration.

In our view, the trial court properly sustained defense objections to plaintiff's statements regarding Thompson's alleged discriminatory remark from 1982 and the DFEH investigator's findings from 1983. As previously noted with respect to the Aguilar and Ross declarations, the final judgment in plaintiff's termination action was res judicata as to all issues that were or could have been litigated in that action.

As to Thompson's accusations of plaintiff's "incompetence," Paul M. Longo, Director of the Legal and Professional Standards Division of the California Commission on Teacher Credentialing, declared in support of the summary judgment motion:

> "The [Commission's] Committee of Credentials exercises jurisdiction over matters related to the fitness of teachers to be granted and to hold credentials. In exercising this jurisdiction, the Committee concerns itself primarily with

> matters pertaining to student safety and welfare. [M]atters pertaining to the competency of a teacher are reserved for local commissions on professional competence pursuant to Education Code section 44944."

On November 6, 1980, the LUSD Commission on Professional Competence found plaintiff incompetent as a classroom teacher by a two-to-one vote. Thus, the lower court did not err in sustaining the defendants' evidentiary objections to this portion of plaintiff's declaration in opposition to summary judgment.

Finally, plaintiff contends the lower court erroneously excluded Escobar's statements at the job faire as hearsay. She points out Escobar is a party to this action and his statements constitute admissible party admissions under Evidence Code section 1220. A judgment shall not be reversed by reason of the erroneous exclusion of evidence unless the court which passes upon the effect of the error is of the opinion the error resulted in a miscarriage of justice and it appears of record the substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means. (Evid. Code § 354, subd.(a).) Even assuming arguendo an erroneous exclusion of this evidence, nothing in the record suggests a miscarriage of justice occurred here. As defendants note, the District "undeniably distinguished appellant from other applicants; the District refused to consider her application for employment." Assistant Superintendent Escobar testified at deposition. "[W]e don't consider candidates who are considered to be incompetent and who have been dismissed by the district. Those are not considered for reemployment." Therefore, Escobar's alleged

statement at the job faire cannot be deemed evidence of pretext. At most, his remark was a statement of District policy, i.e., that no positions were available for a onetime District employee who had been dismissed for incompetence. Any error in this evidentiary ruling did not amount to a miscarriage of justice.

The judgment is affirmed.

/s/
Martin, J.

WE CONCUR:

/s/
Ardiaz, P.J.

/s/
Wiseman, J.

APPENDIX C

MITSUE TAKAHASHI,
Plaintiff,

v.

LIVINGSTON UNION SCHOOL DISTRICT,
et al.,
Defendants.

No. 113234.

Superior Court Of California, County of Merced.

September 7, 1994.

JUDGMENT UNDER CODE OF CIVIL PROCEDURE SECTION 437c

This court, having on August 8, 1994 granted Defendants' motion for summary judgment and having ordered entry of judgment as requested in said motion,

IT IS ORDERED, ADJUDGED AND DECREED that judgment is entered in favor of defendants and against plaintiff.

/s/ Dennis Cornell
Judge of the Superior Court

APPENDIX D

MITSUE TAKAHASHI,
Plaintiff,

v.

LIVINGSTON UNION SCHOOL DISTRICT,
et al.,
Defendants.

No. 113234.

Superior Court Of California, County of Merced.

August 26, 1994.

ORDER FOR ENTRY OF SUMMARY JUDGMENT

The motion of defendants Livingston Union School District and Henry Escobar for summary judgment came on regularly for hearing before this court in Department 3 on August 8, 1994, at 8:30 a.m., The Honorable Dennis Cornell presiding. Nancy B. Bourne, of the law firm of Breon, O'Connell, Miller, Brown & Dannis appeared as attorney for defendants; Daniel L. Mitchell of the law firm of Hayes & Mitchell appeared as attorney for plaintiff Mitsue Takahashi. After full consideration of the evidence and the memoranda of points and authorities submitted by both parties, and oral arguments of counsel, the court finds as follows:

RULINGS ON OBJECTIONS

Rulings on Plaintiff's Objections to Defendants' Evidence:

Objection Number One: Overruled.

Objection Number Two: Overruled.

Objection Number Three: Overruled.

Objection Number Four: Overruled.

Objection Number Five: Overruled.

Objection Number Six: Overruled.

Objection Number Seven: Overruled.

Objection Number Eight: Sustained.

Objection Number Nine: Sustained.

Objection Number Ten: Sustained.

Objection Number Eleven: Overruled.

Objection Number Twelve: Sustained.

Defendants' Objections to Plaintiff's Evidence:

Objection Number One: Sustained.

Objection Number Two: Sustained.

Objection Number Three: Sustained.

Objection Number Four: Sustained.

Objection Number Five: Sustained.

Objection Number Six: Overruled.

Objection Number Seven: Sustained.

Objection Number Eight: Sustained.

Objection Number Nine: Sustained.

Objection Number Ten: Sustained.

Objection Number Eleven: Sustained.

Objection Number Twelve: Sustained.

Objection Number Thirteen: Sustained.

Objection Number Fourteen: Sustained.

Objection Number Fifteen: Sustained.

Objection Number Sixteen: Sustained.

Objection Number Seventeen: Overruled.

RULINGS ON THE MERITS

The court finds that plaintiff has failed to state a prima facie case of race, sex or age discrimination in that plaintiff was not qualified for the position for which she applied at Livingston Union School district and therefore cannot meet the third element of the prima facie case under McDonnell Douglas v. Green (1973) 411 U.S. 49 at 792. Therefore, judgment should be entered in favor of defendants and against plaintiff. The court further finds that even had plaintiff been able to state a prima facie case for discrimination, summary judgment would be entered in favor of

defendants and against plaintiff because plaintiff has presented no evidence of discrimination to support her argument that defendants' legitimate and nondiscriminatory reasons for its action in not considering plaintiff's application for employment were pretextual.

Having made the findings stated above, the court then concludes that there is no triable issue of any material fact with respect to plaintiff's failure to state a prima facie case for discrimination and failure to state a prima facie case for discrimination and failure to present evidence that defendants' reasons for their action were pretextual, and therefore defendants are entitled to judgment as a matter of law.

IT IS ORDERED THAT defendants' motion for summary judgment is granted and judgment shall be entered forthwith as requested in said motion in favor of defendants and against plaintiffs.

/s/ Dennis Cornell
Judge of the Superior Court

Supreme Court, U.S.
FILED
DEC 26 1996
CLERK

No. 96-884

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

MITSUE TAKAHASHI

Petitioner,

v.

LIVINGSTON UNION SCHOOL DISTRICT
and HENRY ESCOBAR,

Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Respondents Livingston Union School District and Henry Escobar object to the questions presented in Petitioner's petition for writ of certiorari because they do not accurately reflect the issues raised by this action. Respondents present the question for review as follows:

Did the California Court of Appeal err in affirming summary judgment in favor of Respondents in the underlying discrimination lawsuit when the evidence showed that Respondents refused to consider Petitioner for a teaching position ten years after Respondents successfully terminated her employment for incompetency?

PARTIES TO THE PROCEEDING

The Petitioner is Mitsue Takahashi, a former teacher with Respondent, Livingston Union School District, who was terminated for incompetency after an adjudicatory proceeding in 1980. Respondents are Livingston Union School District, a California public school district, and Henry Escobar, Assistant Superintendent of Livingston Union School District at the time the lawsuit was filed.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES v

STATUTORY PROVISIONS INVOLVED 1

RESPONDENTS' STATEMENT OF THE CASE 1

A. Termination For Incompetency 1

B. Procedural History 2

CORRECTIONS OF INACCURACIES IN PETITIONER'S STATEMENT OF THE CASE 5

A. The California Committee of Credentials Made No Finding On Petitioner's Competency 6

B. Oscar Pena Had Proper Teaching Credentials 7

C. Oscar Pena Was A Top Bilingual College Graduate 7

D. Petitioner Had A Full Evidentiary Hearing On Competency In 1980 7

ARGUMENT 8

I. SUMMARY OF ARGUMENT 8

II. THIS CASE PRESENTS NO BASIS FOR SUPREME COURT REVIEW 10

III. PETITIONER'S ARGUMENTS IN HER PETITION HAVE NO VALIDITY.. 11

TABLE OF AUTHORITIES

CASES

Federal

McDonnell Douglas Corp. v. *Green*
411 U.S. 792, 36 L.Ed.2d 668, 93 S.Ct. 1817
(1973) 9

Mira v. *Monroe County School Bd.*
687 F.Supp. 1538 (S.D.Fla. 1988) 10

Takahashi v. *Bd. of Trustees of Livingston*
476 U.S. 1182, 91 L.Ed.2d 545, 106 S.Ct. 2916
(1986) 4

Takahashi v. *Bd. of Trustees of Livingston*
783 F.2d 848 (9th Cir. 1986) 4, 5

Takahashi v. *Board of Education*
490 U.S. 1011, 104 L.Ed.2d 168, 109 S.Ct. 1654
(1989) 5

Takahashi v. *Governing Board*
465 U.S. 1008, 79 L.Ed.2d 235, 104 S.Ct. 1003
(1984) 4

Wilson v. *McDaniel*
54 Fair Empl. Prac.Cas. (BNA) 1499,
57 Empl.Prac.Dec., (CCH Para. 11, 222)
(M.D.N.C. 1991), *aff'd,* 935 F.2d 1284
(4th Cir. 1991) 10

State

California Teachers Assn. v. *Governing Board*
144 Cal.App.3d 27 (1983) 4, 5, 8, 11

Takahashi v. *Board of Education*
202 Cal.App.3d 1464 (1988) 4, 5

STATUTES

Federal

Federal Civil Rights Act, Title VII
42 United States Code section 2000e 1, 2

State

California Code of Civil Procedure section 437c 1

California Fair Employment and Housing Act
Government Code section 12900 et seq. 2

RESPONDENTS' BRIEF IN OPPOSITION

Respondents Livingston Union School District and Henry Escobar respectfully submit this brief in opposition to Petitioner's petition for writ of certiorari to review the decision of the Court of Appeal of the State of California in and for the Fifth Appellate District, entered May 13, 1996.

STATUTORY PROVISIONS INVOLVED

Respondents agree that Petitioner's underlying lawsuit alleges a violation of Title VII, 42 U.S.C. section 2000e.

The Civil Rights Act of 1971, 42 U.S.C. section 1983 was cited in the complaint but was never raised at any stage of these proceedings and is not at issue here. Similarly, this case was not adjudicated pursuant to Federal Rules of Civil Procedure, Rule 56. The California Court of Appeal ruling at issue here was determined pursuant to California Code of Civil Procedure section 437c, the State of California summary judgment statute, not Rule 56.

RESPONDENTS' STATEMENT OF THE CASE

A. Termination For Incompetency

In 1980, Petitioner Mitsue Takahashi was lawfully dismissed from her teaching position with the Livingston Union School District ("District") for incompetency. For that reason, when Petitioner applied for another teaching position with the District in 1991, the District did not consider her application. Petitioner thereupon filed a claim for race, age, and sex discrimination. Respondents Livingston Union School

District and Henry Escobar moved for summary judgment and dismissal, which the trial court granted, the state appellate court affirmed, and the California Supreme Court refused to consider for review.

Petitioner has waged continuous litigation against the District since her 1980 termination. Three separate published court decisions have upheld the District's actions. Now a fourth appellate court, this time in an unpublished-decision, has ruled against Petitioner in yet another lawsuit relying on events harking back to the 1980 termination. This is the fourth time this Petitioner has petitioned for United States Supreme Court review of a ruling in the District's favor related to her 1980 termination. This petition is no more meritorious than the other three and should be denied.

The petition for certiorari does not raise any proper ground for review, but simply takes issue with the appellate court decision. This is a run-of-the-mill discrimination case, decided on summary judgment, applying a well-settled rule to a particular set of facts: absent evidence that the District's nondiscriminatory explanation for not hiring Petitioner was a pretext for unlawful discrimination, summary judgment is properly granted. Respondents respectfully urge this Court to deny the petition for review.

B. Procedural History

On June 25, 1993, Petitioner filed a complaint charging Respondents with age, race, and sex discrimination in violation of the California Fair Employment and Housing Act (Gov. Code, § 12900 et seq.) and Title VII of the Federal Civil Rights Act. (42 U.S.C. § 2000e et seq.)

On August 8, 1994, the court granted Respondents' motion for summary judgment, ruling (1) that Petitioner was not qualified for the position for which she applied, (2) that Petitioner presented no evidence that Respondents' legitimate and nondiscriminatory reasons for not considering Petitioner's application for employment was a pretext for discrimination, and (3) that there was no triable issue of any material fact with regard to either of the above issues. (See Superior Court of California, County of Merced Order for Entry of Summary Judgment, Appendix D, pp. 44a - 45a.)

The Court of Appeal for the Fifth Appellate District of California affirmed the trial court's decision. In its decision, the court of appeal held that even assuming Petitioner had established a minimal prima facie case of discrimination, Petitioner did not produce specific, substantial evidence that Respondents' nondiscriminatory reasons for not hiring her were a pretext for discrimination. The court held that the District refused to consider Petitioner for employment for two reasons: (1) the District had previously terminated Petitioner from the same position for incompetency in 1980; and (2) the successful candidate had superior bilingual qualifications. (Opinion, Appendix B, p. 28a.) The evidence excluded by the trial court was in the record. The appellate court considered that evidence in its decision, and held that the exclusion was not error, and, even if error, was not prejudicial because the evidence offered did not show pretext. (Opinion, Appendix B, pp. 31a - 40a.)

The decision at issue here is the latest chapter in Petitioner's long history of unmeritorious employment litigation against the District. Petitioner was a junior high school math and science teacher in the District prior to 1980. In November 1980, an administrative hearing before a California Commission on Professional Competence convened

pursuant to California Education Code section 44944 resulted in a finding that cause to dismiss for incompetency had been established. *California Teachers Assn.* v. *Governing Board,* 144 Cal.App.3d 27, 31 (1983), hereafter referred to as "*Takahashi I.*" On review by petition, the superior court, exercising independent judgment on the evidence pursuant to Education Code section 44945, found cause for dismissal for incompetency. In 1983, the Court of Appeal for the Fifth Appellate District found sufficient evidence to support that decision. *Takahashi I,* 37-38. The California Supreme Court denied Petitioner's petition for review (*Id.* at 38), and the United States Supreme Court denied her petition for a writ of certiorari. *Takahashi* v. *Governing Board,* 465 U.S. 1008, 79 L.Ed.2d 235, 104 S.Ct. 1003 (1984).

Petitioner then filed an action in federal court, alleging constitutional and civil rights violations arising out of her termination. *Takahashi* v. *Bd. of Trustees of Livingston,* 783 F.2d 848, 849 (9th Cir. 1986), hereafter referred to as "*Takahashi II*". The district court granted the District's motion for summary judgment and dismissed the case on the ground that the action was barred by res judicata. (*Ibid.*) The United States Court of Appeal for the Ninth Circuit affirmed that holding in *Takahashi II,* and again the United States Supreme Court denied certiorari. *Takahashi* v. *Bd. of Trustees of Livingston,* 476 U.S. 1182, 91 L.Ed.2d 545, 106 S.Ct. 2916 (1986).

Separate complaints in the superior court alleging common law and civil rights causes of actions were consolidated, and summary judgment was again granted on the basis of res judicata. *Takahashi* v. *Board of Education,* 202 Cal.App.3d 1464, 1471-1473 (1988), hereafter referred to as "*Takahashi III.*" The Court of Appeal affirmed, ruling that the

action was barred by res judicata with regard to both the final administrative and trial court judgments reviewed in *Takahashi I* and the decision with regard to the application of res judicata in *Takahashi II*. See generally, *Takahashi III*. Again, both the California Supreme Court (*Id.*, at 1486) and the United States Supreme Court denied review. *Takahashi* v. *Board of Education*, 490 U.S. 1011, 104 L.Ed.2d 168, 109 S.Ct. 1654 (1989).

CORRECTIONS OF INACCURACIES IN PETITIONER'S STATEMENT OF THE CASE

Petitioner's Statement of the Case rests heavily upon her claim that she was qualified for the Livingston School District teaching position for which she applied in 1991. She appears to believe that if she can convince any court at any level that she was qualified to teach in Livingston, the summary judgment will be reversed. As discussed below, Petitioner's qualification for a teaching credential is not at issue. Whether or not Petitioner was qualified to teach in places other than Livingston, Respondents did not consider her for employment in 1991 because she had been fired from their district for incompetency. Petitioner offered no evidence that Respondents' justifiable reason for its decision was a pretext and thus the court granted Respondents' motion for summary judgment.

Despite Respondents' unassailable legal position, it is important to correct misstatements of fact in Petitioner's Statement of the Case, all of which focus on Petitioner's claim that she was qualified for the teaching job.

A. The California Committee of Credentials Made No Finding On Petitioner's Competency

Petitioner makes the following erroneous statement on page 8 of her petition: "On or about February 19, 1985, a Committee of Credentials of the State Commission On Teaching Credentialing issued a determination that no probable cause existed for the charge of incompetence and continued to uphold Takahashi's life teaching credentials despite the dismissal for incompetence."

The accurate statement, cited in the court of appeal's opinion on page 10a of Appendix B, is as follows: "On or about February 19, 1985, the Committee of Credentials of the State Commission on Teacher Credentialing (Committee) determined **no probable cause existed for the suspension or revocation of plaintiff's teaching credentials.**"

The Committee of Credentials made no determination whatsoever as to whether probable cause existed for the charge of incompetence. As the court explained at length in in its opinion, the distinction between teacher dismissal and license revocation proceedings is well recognized. The 1980 dismissal proceeding before the Commission on Professional Competence ruled that in Livingston Union School District, Petitioner was an incompetent teacher. That ruling had no effect on Petitioner's right to continue to be licensed to teach. She just could not teach in Livingston. Petitioner's misstatement of the facts, which are stated correctly in the court's opinion, is disingenuous. (For a full discussion of the difference between the dismissal proceedings and the licensing proceedings, see Court of Appeal Opinion, Appendix B, pp. 25a through 27a.)

B. Oscar Pena Had Proper Teaching Credentials

Petitioner also misstates the facts on page 9 of her petition where she states that "Pena held no teaching credentials."

Oscar Pena was the teacher hired in 1991 to hold the science position for which Petitioner applied. Although he had not completed all the requirements for a permanent credential at that time, the record shows that he was appropriately credentialed under California law for teaching science at Livingston Union School District in 1991.

C. Oscar Pena Was A Top Bilingual College Graduate

Petitioner makes a misleading statement regarding Oscar Pena's college education on page 10 of her petition where she states that, "Pena did not hold a four-year college degree . . . at the time he made his application."

Although it is technically correct that Mr. Pena was completing his final year of college at the time of his application, the statement misleads the Court. In fact, Oscar Pena was "the top bilingual graduate from Fresno Pacific [College] in 1991" and began his teaching assignment with Livingston after graduation. (Opinion of the Court of Appeal, Appendix B, p. 29a.)

D. Petitioner Had A Full Evidentiary Hearing On Competency In 1980

Petitioner's statement on page 11 of her petition that she "never received a trial on the issue of her competence in 1980"

is contradicted by the lengthy string of citations which make up her litigation history. To repeat, she was tried before a three-member Commission on Professional Competence, pursuant to Education Code section 44944, in 1980 and was found incompetent. The trial court made the same ruling after an independent review of the evidence. *Takahashi I.* Petitioner has obviously never accepted that decision, but she had her trial.

ARGUMENT

I. SUMMARY OF ARGUMENT

Petitioner filed her race, age, and sex discrimination lawsuit soon after Respondents rejected her 1991 application for a teaching job. To prove her claim, Petitioner was required to show that she was qualified for the position and that any legitimate, nondiscriminatory explanation offered by Respondents was merely a pretext. Respondents successfully moved for summary judgment against Petitioner because they were able to establish conclusively a legitimate, nondiscriminatory reason for their actions, such that no triable issue of fact remained.

Respondents never considered Petitioner's application for employment in 1991 because Petitioner had been terminated from a teaching position with the Livingston School District for incompetency in 1980. Pursuant to the extensive and detailed procedural protections set forth in the California Education Code for this kind of termination, a Commission on Professional Competence had been duly convened, and had determined that Petitioner should be terminated for incompetency. On mandamus review, the California superior court, exercising independent judgment of the evidence, also

determined that Petitioner should be terminated for incompetency. This decision was upheld on appeal, and both the State and the United States Supreme Courts denied review.

Petitioner is manifestly not qualified to be a teacher in Livingston. No fewer than three separate appellate opinions have upheld the school district's determination in 1980, and the independent conclusion of the trial court, that she be terminated. Petitioner is collaterally estopped by those decisions from relitigating the issue of her incompetence as a teacher for Livingston. Since she has been determined incompetent as a Livingston teacher, she cannot make a prima facie case of discrimination under *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, 36 L.Ed.2d 668, 93 S.Ct. 1817 (1973).

Moreover, even were Petitioner qualified for the position, the District had a justifiable, nondiscriminatory reason for its action. Surely a public school district is not required to hire back the teachers it has fired for incompetency. Petitioner was unable to produce any evidence whatsoever that this reason was mere pretext. Her one stab[1/] at a showing of discrimination was a statement allegedly made by the former superintendent of Livingston ten years before Petitioner's 1991 application that Japanese people are "quiet" and "non-assertive." Both the trial court and the Court of Appeal rejected this evidence as too remote and lacking any nexus with the 1991 hiring decision.

[1/]Petitioner also tried to argue that Henry Escobar's alleged statement to Petitioner at the 1991 job fair that there were no jobs proved discrimination. The court of appeal correctly ruled that the alleged statement, even if true, did not constitute specific, substantial evidence of pretext. (Opinion, App. B, pp. 30a - 31a.)

Summary judgment was properly granted and affirmed. This case does not merit United States Supreme Court consideration.

II. THIS CASE PRESENTS NO BASIS FOR SUPREME COURT REVIEW

The United States Supreme Court accepts for review only cases involving important federal questions with broad public policy implications. This case does not begin to meet that test. The decision merely reiterates established state and federal discrimination law that, absent evidence that an employer's non-discriminatory explanation for not hiring an employee was a pretext for unlawful discrimination, summary judgment is properly granted.

Rule 10 of the Rules of the Supreme Court of the United States sets forth specific reasons for which the Court will grant certiorari. None of the Rule 10 reasons applies here.

The petition in this case challenges a state court decision, not a decision of the United States Court of Appeals. The California Supreme Court, the state court of last resort, refused to consider this case. The state court of appeal made no decision on an important federal question that conflicts with decisions of other state courts of last resort or a United States court of appeals. On the contrary, the California court of appeal in this case expressly followed the ruling of two federal court cases, *Wilson* v. *McDaniel,* 54 Fair Empl. Prac.Cas. (BNA) 1499, 57 Empl.Prac.Dec., (CCH Para. 11, 222) (M.D.N.C. 1991), *aff'd,* 935 F.2d 1284 (4th Cir. 1991) and *Mira* v. *Monroe County School Bd.*, 687 F.Supp. 1538 (S.D.Fla. 1988).

The decision of the court of appeal in this case is in no way an important question of federal law that should be settled by this Court. It is instead a run of the mill discrimination lawsuit decided appropriately on summary judgment.

III. PETITIONER'S ARGUMENTS IN HER PETITION HAVE NO VALIDITY

Petitioner first argues that "direct evidence of discrimination practiced against Americans of Japanese descent by public school officials defeats summary judgment."

In fact, this argument requires a stretch back in time to a chance remark made ten years prior to Respondents' 1991 rejection of Petitioner's employment application. This is the best Petitioner could do to show discrimination and the court properly ruled the remark lacked nexus. The only mention in the record of Japanese Americans by any of the school district employees at any time was an alleged remark by former Superintendent Harold Thompson in 1982 to Antonio Aguilar, Senior Consultant of the Department of Fair Employment and Housing's Fresno office, that Japanese people tend to be "quiet" and "not assertive." As the court of appeal correctly determined, there was no nexus established by Petitioner between that alleged 1982 statement and the decision by Henry Escobar in 1991 not to hire Petitioner as a teacher with the District.

In 1983, the California court of appeal found sufficient evidence to support the District's 1980 termination of Petitioner's employment for cause. *California Teachers Association* v. *Governing Board*, 144 Cal.App.3d 27, 37-38 (1983). *Takahahi I.* . In 1988, the California Court of Appeal held that the final judgment in the 1983 action was res judicata

as to all issues that were or could have been litigated in that action. *Takahashi* v. *Board of Education,* 202 Cal.App. 3d 1464, 1471-1473 (1988). *Takahaski III.* Therefore, in neither her 1988 action nor her 1993 action could Petitioner use the alleged remark by Harold Thompson to argue that her original 1980 termination was the result of discrimination.

To use the 1982 alleged statement as a demonstration of discrimination in 1991, Petitioner had to show a nexus between Thompson's alleged statement and Henry Escobar's 1991 decision not to consider the plaintiff's application. The court of appeal correctly concluded that nothing in the record suggested such a nexus. Even if Petitioner could prove Thompson was biased against her in 1982, she did not make any "proffer of evidence which reaches beyond speculation and conjecture to show a connection with the District's decision not to consider her 1991 application for employment." (Opinion, Appendix B, pp. 30a - 31a, 34a - 36a.)

Petitioner's second argument in petitioning this Court for review is that the state court of appeal erred in finding she was not qualified for the position and thus could not state a *prima facie* case of discrimination. Such an argument misstates the court of appeal's decision. The trial court did indeed rule that Petitioner was not qualified for the position because she had previously been terminated from the position by the District for incompetency, and therefore, she could not establish a *prima facie* case. The appellate court, however, did not so rule. Although the appellate court's discussion was favorable to a finding that Petitioner was not qualified, the Court did not reach that conclusion explicitly. Rather, the Court stated as follows:

> The degree of proof necessary to establish a *prima facie* case for Title VII claims on summary judgment is minimal and does not need to rise to the level of preponderance of the evidence. However, even assuming *arguendo* that plaintiff has produced the minimum evidence necessary to establish a *prima facie* case, this does not preclude summary judgment here. . . . When evidence to refute the defendants' legitimate explanation is totally lacking, summary judgment is appropriate, even though plaintiff may have established a minimal *prima facie* case.

(Opinion, Appendix B, pp. 27a, 28a.)

The decision at issue here was based on the lack of evidence of pretext, not on the failure to establish a *prima facie* case. Thus, even if a court were to rule that Petitioner was qualified for the job, summary judgment would still be granted in favor of Respondents because of Petitioner's complete failure to produce evidence that the District's reason for not hiring her in 1991 was discriminatory. In fact, the District quite understandably did not want to put back into the classroom a teacher they had fired for incompetency. If there is any public policy issue raised by this case, that is it.

Petitioner's third argument is that bilingual ability was not a requirement for the advertised position. She makes this argument because the court of appeal found that the District refused to consider Petitioner's application in 1991 for two reasons: (1) the District had previously fired her; and (2) the District was under a state court order to hire more Spanish

speaking teachers for their growing Spanish speaking student population. (Opinion, Appendix B, p. 28a.)

Whether or not bilingual ability was an absolute requirement for the job, the undisputed facts demonstrate that the District had a shortage of qualified Spanish bilingual teachers to meet the needs of the increasing number of Spanish speaking students in the District, and the State had ordered the District to create a plan to remedy this shortage. Oscar Pena, the successful candidate for the 1991 science position was a Mexican-American with Spanish as his first language. Petitioner admitted at deposition that she did not consider herself conversant in Spanish. (Opinion, Appendix B, pp. 12a - 13a, 29a.)

The court therefore correctly concluded that the District's choice of Mr. Pena over Petitioner was justified and non-discriminatory. Petitioner was able to produce no evidence showing that this rationale for the decision was a pretext. (See Opinion, Appendix B, p. 28a through 31a.)

Finally, Petitioner argues that public policy dictates that she should receive a trial on the merits "to insure the integrity of a state-issued license, job tenure rights, the education of the nation's children and equal employment opportunity."

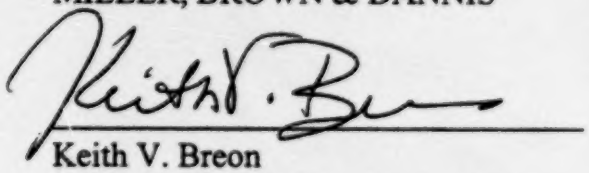
Respondents agree only that public policy is at issue here. The overwhelming public policy is that public school districts, so severely criticized in the past several decades for not attaining their goals of educating the nation's children, should never, ever be required to rehire teachers who have been determined, after an evidentiary trial, to be incompetent.

Petitioner has exhausted the resources of public education and the court system for 16 years. This is the fourth appeal to the United States Supreme Court. This Court has no choice but to deny certiorari in this case.

Dated: December 20, 1996

Respectfully submitted,

BREON, O'DONNELL
MILLER, BROWN & DANNIS



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